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FAMILY AND MEDICAL LEAVE ACT OF 1993

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Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

MINORITY VIEWS

[To accompany S. 5]

The Committee on Labor and Human Resources, to which was referred the bill (S. 5) to entitle employees to family and medical leave in certain cases involving a birth, an adoption, or a serious health condition of an employee, a child, a spouse or a parent, with adequate protection of the employees' employment and health benefit rights, having considered the same, reports favorably thereon and recommends that the bill do pass.

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I. SUMMARY OF THE BILL

Title I of S. 5, the Family and Medical Leave Act of 1993, makes available to eligible employees up to 12 weeks of unpaid leave per

year under particular circumstances that are critical to the life of a family. Leave may be taken (1) upon the birth of the employee's child, (2) upon the placement of a child with the employee for adoption or foster care, (3) when the employee is needed to care for a child, spouse or parent who has a serious health condition, or (4) when the employee is unable to perform the functions of his or her position because of a serious health condition.

The act exempts small businesses and limits coverage of private employers to employers who employ 50 or more employees for each working day during 20 or more calendar weeks in the current or preceding calendar year. To be eligible for leave, an employee of a covered employer must have been employed by the employer for at least 12 months and must have worked at least 1,250 hours during the 12-month period proceeding the commencement of the leave. The employer must, in addition, employ at least 50 people within a 75-mile radius of the employee's worksite.

If the employer provides paid leave for which the employee is eligible, the employee may elect or the employer may require the employee to substitute the paid leave for any part of the 12 weeks of leave to which the employee is entitled under the act. When the need for leave is foreseeable, the employee must provide reasonable prior notice, and make efforts to schedule leave so as not to disrupt unduly the employer's operations. An employer may also require an employee to report periodically during the leave period on the employee's leave status and intention to return to work. Spouses employed by the same employer are limited to a total of 12 weeks of leave for the birth or adoption of a child or for the care of a sick parent.

An employer may require medical certification to support a claim for leave for an employee's own serious health condition or to care for a seriously ill child, spouse or parent. For the employee's own medical leave, the certification must include a statement that the employee is unable to perform the functions of his or her position. For leave to care for a seriously ill child, spouse or parent, the certification must include an estimate of the amount of time the employee is needed to care for the child or parent. An employer may require a second medical opinion and periodic recertification at its own expense. If the first and second opinions differ, the employer, again at its own expense, may require the binding opinion of a third health care provider, approved jointly by the employee and the employer.

An employee needing leave because of his or her own serious health condition or the serious health condition of a child or parent may, if medically necessary, take leave intermittently or on a reduced leave schedule that reduces the employee's usual number of hours per workweek or per workday. However, if an employee requests leave on such a basis, the employer may require the employee to transfer temporarily to an alternative position which better accommodates recurring period of leave than the employee's regular position, provided that the position has equivalent pay and benefits. An employee taking leave to care for a newborn child or a child which has been placed with the employee for adoption or foster care may not take leave intermittently or on a reduced leave

schedule unless the employer and the employee agree to such an arrangement.

The act establishes special rules governing the availability of leave for employees of local educational agencies who are employed principally in an instructional capacity. These special rules apply to the scheduling of intermittent leave based on planned medical treatment and leave beginning or ending during the 5-week period prior to the end of an academic term.

During leave, any pre-existing health benefits provided to the employee by the employer must be maintained. The employer is under no obligation to allow the employee to accrue seniority or other employment benefits during the leave period. Upon return from leave, the employee must be restored to the same or an equivalent position. The taking of leave may not deprive the employee of any benefit accrued before the leave, nor does it entitle the employee to any right or benefit other than that to which the employee would have been entitled had the employee not taken the leave.

It is unlawful under the act for any employer to interfere with or restrain or deny the exercise of any right provided under the act. It is also unlawful for any employer to discharge or otherwise discriminate against any individual for opposing a practice made unlawful under the act, or for participating in any inquiry or proceeding relating to rights established under the act.

To ensure compliance with the Family and Medical Leave Act, the Secretary of Labor is given investigative authority parallel to the authority provided to the Secretary with regard to enforcement of the Fair Labor Standards Act of 1938. Employers are required to make, keep and preserve records pertaining to compliance with the Family and Medical Leave Act, but the Secretary may not under authority of the act require employers to submit their books or records to the Secretary more than once during any 12-month period unless the Secretary has reason to believe that the act has been violated or is investigating a complaint of violation.

Rights established under the Family and Medical Leave Act are enforceable through civil actions. A civil action for damages or equitable relief may be brought against an employer in any Federal or State court of competent jurisdiction by the Secretary of Labor or by any employee, except that an employee's right to bring such an action is terminated if the Secretary files an action seeking relief with respect to that employee. An employer found to have violated the Family and Medical Leave Act is liable to each affected employee for monetary damages resulting from the violation, and an additional amount equal to the actual damages as liquidated damages. However if the employer proves to the satisfaction of the court that it acted in good faith and had reasonable grounds to believe that its acts or omissions were not a violation, the court may, in its discretion, limit the employer's liability to the actual damages. Relief available in the event of a violation also includes such equitable relief as may be appropriate, including employment, reinstatement or promotion of the affected employee, and the award of reasonable attorney's and expert witness fees and costs. Actions must be brought not later than 2 years after the date of the last event constituting the alleged violation, or within 3 years of the last event if the violation is willful.

Title II of the act extends coverage of the act to Federal civil service employees.

Title III of the act establishes a bipartisan Commission on Leave which is charged to conduct a comprehensive study of existing and proposed policies relating to leave, the potential benefits and costs of such policies to employers, and possible alternative State enforcement of leave rights for employees of local educational agencies.

Title IV of the act provides that nothing in the act is to be construed to (1) modify or affect any Federal or State law prohibiting discrimination, (2) supersede any State or local law which provides greater family or medical leave rights than those established under the act, (3) diminish an employer's obligations under any collective bargaining agreement or employment benefit program or plan providing greater family or medical leave rights than those established under the act, or (4) discourage employers from adopting or retaining leave policies more generous than those required in the act.

In addition, title IV directs the Secretary of Labor to prescribe regulations to carry out titles I and IV within 120 days of enactment of the act and establishes effective dates for each title. The act generally is to take effect 6 months after the date of enactment, except for title III (establishing the Commission) which is to take effect immediately upon enactment. In cases where a collective bargaining agreement is in effect on the effective date, the act is to become effective upon termination of the agreement, but no later than 12 months after the date of enactment.

Title V provides that the rights and protections established under the act are to apply to employees of the Senate. Allegations of violations are to be handled consistent with relevant provisions of the Government Employee Rights Act of 1991.

II. Background and Need for Legislation

Private sector practices and government policies have failed to adequately respond to recent economic and social changes that have intensified the tensions between work and family. This failure continues to impose a heavy burden on families, employees, employers and the broader society. S. 5 provides a sensible response to the growing conflict between work and family by establishing a right to unpaid family and medical leave for all workers covered under the act.

THE FAMILY AND MEDICAL LEAVE ACT SETS A MINIMUM LABOR STANDARD

The Family and Medical Leave Act (FMLA) accommodates the important societal interest in assisting families, by establishing a minimum labor standard for leave. The bill is based on the same principle as the child labor laws, the minimum wage, Social Security, the safety and health laws, the pension and welfare benefit laws, and other labor laws that establish minimum standards for employment.

Each of these standards arose in response to specific problems with broad implications. The minimum wage was enacted because

of the societal interest in preventing the payment of exploitative wages. Children were working for long hours, under unsafe conditions, when the child labor laws were enacted. The Social Security Act was based on the belief that workers should be assured a minimum pension at retirement. The Occupational Safety and Health Act created standards to help assure safe and healthy workplaces.

To address concerns about the employment rights of returning veterans, Congress enacted a labor standard that is directly analogous to S. 5. The Veterans' Reemployment Rights Act, enacted in 1940, provides up to 4 years of job security to workers called to military duty (including reservists and National Guard personnel called to active or inactive duty for training or drills). Returning workers are entitled to reinstatement to their previous job with full retention of seniority, status, pay, and any other benefits.

There is a common set of principles underlying each of these labor standards. In each instance, a Federal labor standard directly addresses a serious societal problem, such as the exploitation of child labor, or the exposure of workers to toxic substances. Voluntary corrective actions on the part of employers had proven inadequate, with experience failing to substantiate the claim that, left alone, all employers would act responsibly. Finally, each law was enacted with the needs of employers in mind. Care was taken to establish a standard that employers could meet.

It is a minority of employers who act irresponsibly. Even without minimum standards most employers would pay a living wage, take steps to protect the health and safety of their work force, and offer their employees decent benefits. A central reason that labor standards are necessary is to relieve the competitive pressure placed on responsible employers by employers who act irresponsibly. Federal labor standards take broad societal concerns out of the competitive process so that conscientious employers are not forced to compete with unscrupulous employers.

The Family and Medical Leave Act was drafted with these principles in mind and fits squarely within the tradition of the labor standards laws that have preceded it. In the past, Congress has responded to changing economic realities by enacting labor standards that are now widely accepted. In drawing on this tradition, the FMLA proposes a minimum labor standard to address significant new developments in today's workplace.

THE NEW DEMANDS ON FAMILIES AND WORKERS

The United States has experienced a demographic revolution in the composition of the workforce, with profound consequences for the lives of working men and women and their families.

The General Accounting Office reports that, over the past 40 years, the female civilian labor force has increased by about a million workers each year. By 1990, nearly 57 million women were working or looking for work—more than a 200 percent increase since 1950. The Bureau of Labor Statistics predicts that by the year 2005, the female labor force participation rate will reach 66.1 percent.

In its Corporate Reference Guide to Work-Family Programs, the Families and Work Institute predicts that by 1995, two-thirds of

women with pre-school children and three-quarters of the women with school-age children will be in the labor force. Today, according to the Bureau of Labor Statistics, 96 percent of fathers and 65 percent of mothers work outside the home. The participation of women in the labor force was 19 percent in 1900; today 74 percent of women aged 25–54 are in the labor force. Fifty-six percent of mothers with children under age six and 51 percent of mothers with children under age one are in the labor force.

Women accounted for more than three-fifths (62 percent) of the increase in the civilian labor force since 1979 and it is predicted that by the year 2000, 2 out of 3 new entrants to the workforce will be women. Today more than 45 percent of the U.S. labor force are women.

Equally dramatic has been the substantial increase in the number of single-parent households. The Census Bureau reports that single parents accounted for 27 percent of all family groups with children under 18 years old in 1988, more than twice the 1970 proportion. Divorce, separation, and out-of-wedlock births have left millions of women to struggle as single heads of households to support themselves and their children. These women often cannot keep their families above the poverty line. In 1987, 20 percent of all children under age 6 lived with single mothers. The poverty rate among these young children was 61.4 percent, more than five times the poverty rate of 11.6 percent among children living in two-parent families.

Mothers' employment is often critical in keeping their families above the poverty line. A 1990 report by Columbia University's National Center for Children in Poverty, "Five Million Children: A Statistical Profile of Our Poorest Young Citizens," found that children whose mothers work are less likely to be poor, whether they live with one or two parents. Two percent of children in married-couple families where the mothers worked full-time were poor in 1987, while the poverty rate for children in married-couple families where the mother did not work was 21 percent. For young black children whose mothers were employed full-time, the incidence of poverty declined dramatically from 26 percent to 13 percent.

S. 5 also responds to another dramatic demographic shift: the aging of the American population. Due to advances in medical technology and health care, Americans are living longer than ever before. The fastest growing segment of the American population is the elderly. Currently 32 million Americans are aged 65 and over, comprising 12 percent of the population. Between 1980 and 1990, the number of people aged 75 or older grew by nearly one third.

The percentage of adults in the care of their working children or parents due to physical and mental disabilities is growing. Because removing people from a home environment has been shown to be costly and often detrimental to the health and well-being of persons with mental and physical disabilities there is a trend away from institutionalization. While preferable, independent living situations can result in increased care responsibilities for family members, who by necessity are also wage earners. Home care, while laudable, can also add to the tension between work demands and family needs.

The National Council on Aging estimates that 20 to 25 percent of the more than 100 million American workers have some caregiving responsibility for an older relative. Two-thirds of the nonprofessional caregivers for older, chronically ill, or disabled persons are working women, the most common caregiver being a child or spouse.

A 1990 study by the Southport Institute for Policy Analysis found that the conflicting demands of work and caregiving can create enormous strains. The Southport report, "Caring Too Much? American Women and the Nation's Caregiving Crisis," found that "caregiving not only causes stress for individuals, it may be a substantial drag on national productivity. In a period where shortages of skilled labor are growing, 11 percent of caregivers have left the labor force to provide care." African American caregivers are especially at risk because greater percentages of black caregivers quit their jobs in order to provide care. Without responsive policy, the heightened need for elder care will continue to exert enormous pressures on working families and the economy.

The need for job protected medical leave arose long before the dramatic new changes in the workforce. Workers and their families have always suffered when a family member loses a job for medical reasons. But such losses are felt more today because of the dramatic rise in single heads of household who are predominantly women workers in low-paid jobs. For these women and their children, the loss of a job because of illness can have devastating consequences.

The effect of these demographic changes has been far reaching. With men and women alike as wage earners, the crucial unpaid caretaking services traditionally performed by wives—care of young children, ill family members, aging parents—has become increasingly difficult for families to fulfill. When there is no one to provide such care, individuals can be permanently scarred as basic needs go unfulfilled. Families unable to perform their essential function are seriously undermined and weakened. Finally, when families fail, the community is left to grapple with the tragic consequences of emotionally and physically deprived children and adults.

TESTIMONY ON THE NEED FOR FAMILY AND MEDICAL LEAVE

The Subcommittee on Children, Family, Drugs and Alcoholism conducted nine hearings since 1987 on similar family and medical leave legislation. In addition, the subcommittee conducted a hearing on January 22, 1993 on S. 5. There, the need for family and medical leave and the effects of family leave on business were explored in further detail. At this hearing and at the nine other subcommittee hearings held since 1987, witnesses testified about the difficulties they faced in attempting to meet the needs of their families and the demands of their jobs. Their experiences provide a human dimension on the need for a national policy on family and medical leave for each of the circumstances covered under the bill.

CHILDBIRTH AND ADOPTION

Many new parents have no guarantee that their jobs will be protected either when they are unable to work due to pregnancy, childbirth, or related medical conditions, or after childbirth or

placement for adoption or foster care when they need to stay home to care for their infants. In Atlanta, Ms. Beverly Wilkinson told the subcommittee of losing her job when she gave birth to her first child. For 5 years she had worked as a secretary for an Atlanta corporation that described itself as a "family oriented company". When her child was born, she took 2 weeks of vacation time and 5 weeks of maternity leave as permitted by the company policy. The week before she was due back for work, she received a call telling her that her job had been eliminated due to a departmental reorganization. In spite of her record of good performance reviews and her ability to perform other jobs at the large company, she was not offered another position.

Similarly, a television anchor from Portland, OR, told the subcommittee of being forced to choose between her job and her newborn child. Ms. Rebecca Webb initially had an agreement with her employer for a 3-month leave after childbirth. However, 7 months into her pregnancy, the leave previously granted was rescinded. The company claimed that they did not want to set a precedent for maternity leave because there were four other pregnant women working at the time. With the maternity leave no longer available, Ms. Webb was forced to quit her job.

Ms. Carmen Maya told of losing her job at a hospital where she had worked 19 years as a pharmacy technician. Special arrangements for her child with Down's Syndrome and her own medical complications meant that she needed 12 weeks of leave. However, as she prepared to return to her job, her supervisor called to tell her that her job was no longer open. She told the committee:

> I'm still shocked at my sudden plunge from economic self-sufficiency to dependence, all because I needed time off for family and medical needs. Basically, it has been a nightmare. I'm used to bringing home a paycheck. But because I lost my job, I had to stand in welfare lines to get food for my children.

Adoptive parents also face difficulties in the absence of a reasonable family leave policy. Most adoption agencies require the presence of a parent in the home—some for as long as 4 months—when a child is placed with the family to allow them adequate time for proper bonding. When Ms. Catherine Hodge, a teacher in Los Angeles, adopted a child, she was only allowed one month of leave by her employer. She told the subcommittee that more time would have been very helpful, especially in view of the boy's many physical and mental disabilities, and the difficulties she had in establishing a stable environment and integrating him into his new life. More time at the beginning, as well as a clear policy for later flareups of the child's illness, would have eased the difficulties that Ms. Hodge's family experienced in dealing with four hospitalizations and with arrangements for special education classes and other assistance for the boy in school. Without a family leave policy, both her company and her son suffered.

In his testimony, Mr. Joe Kroll of the North American Council on Adoptable Children stressed the need for job security during the important period of adjustment after the adoption of a special needs (or any) child. He stated that: "Prospective adoptive parents

will be more able to consider special needs adoptions if they know they are not jeopardizing their jobs in the process. Thus, in exchange for job security, adoptive parents volunteer to love and care for a child who has been abandoned or neglected, and for whom the state would otherwise be responsible."

These many personal accounts of the importance of family leave are corroborated by experts in the fields of child development and pediatrics. Dr. Ed Zigler, director of the Yale Bush Center on Child Development and Social Policy and former director of the Office of Child Development Policy at the then U.S. Department of Health, Education, and Welfare, testified in strong support of the legislation. The Yale Bush Center had convened a distinguished advisory committee to direct a 2-year study of our Nation's infant care situation and to evaluate the impact of the changing composition of the workforce on families with infants. The committee was particularly concerned about low-income working parents and parents with premature, disabled or severely ill infants. The committee's primary recommendation was for an infant care policy that would allow employees an adequate period of time for parents to care for newborn or newly adopted infants and for mothers to recover from pregnancy and child birth. Based on the committee's findings, as well as his 30 years of work on policies related to children and families, Dr. Zigler told the subcommittee: "While I do not feel this bill goes far enough, it is an absolutely necessary first step * * *. Parental leave is critical to the healthy development of children and families."

Another world-recognized specialist in early childhood development, Dr. T. Berry Brazelton, from Harvard University and Children's Hospital in Boston, also stressed the importance of infant-parent bonding during the first few months of a child's life. He urged that at least one parent have the opportunity to care for a newborn in order to create a strong foundation for the child's later development. The early nurturing and attachment enables the parent to instill in the infant a sense of confidence and of being an important person. Dr. Brazelton told the subcommittee that in the course of speaking with 1,500 parents every week, he has learned that most women who return to work too soon after childbirth do so because of their family's need for health insurance benefits.

CHILD'S SERIOUS ILLNESS

A tragic example of the need for job protection for parents when their children are seriously ill was provided by Mr. Thomas Riley. His son was diagnosed as having cancer when he was 4½ years old. During the illness and extensive treatments, Mr. Riley was hired as a supervisor at a jewelry manufacturing company with the expressed understanding that he would need and receive time to accompany his son to medical treatments. Over the next 6 months his son's condition deteriorated, and Mr. Riley somehow managed both to care for his son and work at least 50 hours a week. He took a total of 6 days off from work during this period, all of which were uncompensated. Shortly after his son died, Mr. Riley was fired for no apparent reason, and in spite of his incredible efforts to give the

job everything he could. He spoke for himself and many others in saying:

> I have always worked hard for a living, and taken pride in providing for my family. There are millions of American fathers like me. I don't want any, or expect any, special favors from anyone, from my employers or the Government. But I don't think that parents should be forced to choose between caring for their children or keeping their jobs.

Pediatricians also addressed the needs of children who are seriously ill, whose recovery is greatly enhanced by parental care. Dr. Stuart Siegel, head of the Division of Hematology and Oncology at Children's Hospital in Los Angeles, testified that the prospects for long-term survival for children with life-threatening illnesses are much better when the parents are able to assist with the treatment. For example, parents must transport their children to the hospital frequently and be available to the children at home in order to monitor their condition and to administer some of the therapy. Unfortunately, he reported that in caring for over 2,000 children with cancer and serious blood diseases, he has—

> Encountered numerous instances where parents had to choose between bringing their child to the hospital for much needed medical treatment and evaluation versus losing their jobs. * * * In almost all cases, the employers were aware of the nature and severity of the illness that the parent was dealing with in their child, but nevertheless, the parent was still faced with this terrible choice.

Ms. Dot Holland, the director of Social Work at Henrietta Egleston Hospital for Children in Atlanta, GA, pointed out that most hospitals expect at least one parent to stay in the hospital with a child most of the time. While this rooming-in contributes to the child's recovery, if the working parent with insurance chooses to stay at the hospital and loses his or her job, even when another job is obtained, there may no longer be insurance coverage for a chronically ill child because of the exclusion of pre-existing conditions. The loss of insurance may in turn force the family to depend on welfare and mark the first step in the cycle of poverty, especially in a single-parent family. Ms. Holland testified that although family and medical leave legislation would not solve all the problems that the parents of their patients face, it will "help many families survive the crisis of a child's serious illness or the birth of a child emotionally intact and financially solvent."

ELDER CARE AND SPOUSAL CARE

Virtually the same policy considerations arise when a worker faces the serious illness of his or her own parent or spouse. The urgent need to deal with the serious illness of the parent often creates a crisis for the worker and the entire family. At this time a stable income, the assurance of a secure job, and the opportunity to take time off when necessary are at a premium for the worker with caregiving responsibilities.

The subcommittee heard testimony from a worker whose employer was unwilling to provide the needed flexibility. Ms. Myra Guski, a medical technologist, was forced to choose between her dying 76-year-old father and her job when her employer refused to grant her request for temporary family leave:

> When my father's death was close, I asked my supervisor for a leave of absence. He flatly refused my request. I had no choice but to resign * * *. Caring for a loved parent is difficult under the best of circumstances * * *. But my parents' need shouldn't have put my job in jeopardy. Had the Family and Medical Leave Act been law in 1983, I would not have been asked to choose between my father and my job.

Ms. Sandra Seymour told the subcommittee of being denied leave when her 82-year-old father suffered two heart attacks in 1988. She generalized from her experience in saying that—

> Part of the solution is permitting sons and daughters time to assist in the reorganization of their parents' lives, time to do something other than shove their parents into institutions when it is not necessary, time to investigate what is best when home care is no longer practical. Family and medical leave legislation facilitates such decisions. The little people—the common man—we are too often unable to adjust our work schedules when family emergencies demand our presence. Therefore we must seek support and empathy from state and Federal legislators.

In the absence of a national family leave policy, approximately 11 percent of caregivers presently are forced to quit employment or are fired because of their caregiving responsibilities, according to information provided to the subcommittee by Dr. Robyn Stone of the National Center for Health Services Research and Health Care Technology Assessment. In addition, a recent survey, conducted for the American Association of Retired Persons and the Travelers' Companies Foundation, found that because of caregiving responsibilities, 38 percent of employed caregivers had to change from full-time to part-time work. According to the same survey, approximately 20 percent of working caregivers had their benefits, including health insurance, reduced.

LEAVE FOR THE EMPLOYEE'S OWN SERIOUS ILLNESS

In addition to the family leave purposes described above, S. 5 provides for unpaid job protected leave and the continuation of any existing health insurance coverage during an employee's serious illness. The fundamental rationale for such a policy is that it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working. Job loss because of illness has a particularly devastating effect on workers who support themselves and on families where two incomes are necessary to make ends meet or where a single parent heads the household. As Eleanor Holmes Norton testified:

> For the single parent, usually a woman, losing her job when she is unable to work during a time of serious health condition can often mean borrowing beyond prudence, going on welfare, or destitution for herself and her family. Indeed, it is hard to understand how single parents, who have no choice but to work to support their families, have survived under the present system. For this highly vulnerable group, whose numbers have exploded, a job guarantee for periods when they or their children have serious health conditions is urgently necessary. The high rates of single parenthood among minority families and of labor force participation by minority single mothers make job-guaranteed leaves especially critical for minorities.

A compelling example of the harm inflicted when a seriously ill employee is fired was recounted at congressional hearings by Ms. Frances Wright. Despite 10 years of exemplary service as a retail manager of a clothing store in Virginia, she was fired after developing cancer of the colon. She initially needed approximately 12 weeks off for surgical procedures. Later, although she made every effort to accommodate the employer's needs by scheduling chemotherapy treatments on weekends (keeping work loss to one day), and although she had been absent from work in her 10 years with the company only two other times (for a total of 3 weeks), she was fired. The 2 year interval before she was finally able to find new work was extremely difficult for her.

Subsequent events in the account of Ms. Wright reveal that companies that have fired workers with serious health conditions are perfectly able to take a more generous approach. When Ms. Wright's company was taken over by a new owner, she was hired back; and this time, when she had a recurrence of the cancer, she received 5 weeks of paid leave, and took her leave with the emotional and financial security of knowing her job was not at risk.

In her testimony before the subcommittee, Ms. Barbara Hoffman, vice president of the National Coalition for Cancer Survivorship stressed the need for job protection for cancer patients who face termination due to their medical condition. According to Ms. Hoffman, approximately 25 percent of all cancer survivors, over one million Americans, experience some form of employment discrimination solely because of their cancer history. In a Stanford University study of 400 cancer patients, 6 percent of the patients were terminated after treatment. Ms. Hoffman stated that "such discrimination against qualified employees costs society millions of dollars in lost wages, lost productivity and needless disability payments."

EMPLOYERS FIND FAMILY LEAVE POLICIES COST-EFFECTIVE

The subcommittee received testimony from a wide range of employers that already provide family and medical leave. Many of the witnesses testified in dual capacities, as small employers providing leave and as experts in other areas relevant to the legislation. From this testimony, and from a wide body of study and research data, the committee concludes that family and medical leave is cost-effective in terms of reduced hiring and training costs, turnov-

er, and absenteeism. Mr. Geoffrey Carter, a small business owner, affirmed this conclusion in his testimony:

> It has been my experience that the best policy is to provide the necessary leave and to plan accordingly. This is accomplished by spreading the workload and supporting the temporary leave with temporary employees. The cost of this alternative is short term, and the benefits of this policy command the respect and loyalty of all our employees.

Mr. Lawrence Perlman, president and chief executive officer of Control Data Corp. drew on the experiences of his company and argued that a national standard for leave will help individual businesses and the economy as a whole.

> * * * the Family and Medical Leave Act is a modest and timely response to unprecedented demographic and cultural shifts in the nature of the American workforce. Over the years, enlightened and successful businesses have demonstrated the wisdom and value of family and medical leave policies. Our experiences show that this is an area where a Federal minimum standard can, at relatively little cost, make a very real difference to workers * * *. It can also work to bolster the economy by reducing turnover among experienced, trained employees and above all foster an environment among corporate and community leaders that nurtures children and family members.

Mr. David Warfield, vice president of the Board of Trustees of Huntington Beach Union High School in California reviewed three decades of positive experience with leave in their school system:

> Over the past 30 years the district has had an average of four employees taking advantage of the maternity/adoption leave and/or utilizing paid sick leave benefits, less than 1 percent of the staff. * * * The district has experienced no major problems or hardships in conducting school business while employees were on maternity leave. The services of qualified substitutes have always been available so that the education of our young people has not been interrupted and the day-to-day functioning of the district has not suffered any detriment. The district has always cooperated in granting maternity/adoption leaves and including maternity disability under paid sick leave benefits because it has been the philosophy of the district to hire and retain the best qualified employees.

Ms. Jeanne Kardos, director of employee benefits for the Southern New England Telephone Co. (SNET), summarized the company's 10 years of experience with parental and medical leave. Leave policies at SNET include general medical leave, infant care leave for mothers and fathers (after the period of disability for mothers of newborns), leave for adoption, for a child's serious illness, and continuation of health insurance. Ms. Kardos testified that the leave policies are considered an asset by management and workers alike.

> We recognize that women with small children are in our workforce to stay. * * * These women are very highly trained. They have a tremendous amount of job experience, and we do not want to lose them. They have a special need that we have recognized. The need is parenting * * *. We also have a very selfish reason. We regard these people as assets to the corporation. We have a lot invested in them. * * * We think by having these kinds of benefit plans, we can attract the best people and keep them. * * * We think it is cost-effective rather than costly * * * [because] it serves productivity. We get people back who are not only highly trained and skilled in what they do, but we get them in such a way that they are very grateful to the company that cares for them, and they stay with us. Our average service in our company is very long.

To help assess the impact of similar leave laws at the State level, the subcommittee invited the Commissioner of the Oregon Bureau of Labor and Industries to testify about the State's experience with recently enacted family leave legislation. In preparation for her testimony, Commissioner Mary Wendy Roberts contacted employers throughout the State who reported little or no difficulty in implementing the State law. She also found that none had reduced other existing benefits when they came into compliance with the statutory family leave requirements. At the same hearing, Ms. Dana Friedman testified that in her extensive consulting with companies on the family leave policies, "there was absolutely no indication that there was a plan to cut back on other benefits". It should come as no surprise, then, that at the subcommittee's February 2, 1989 hearing, a top official of the major national business lobbying organization opposed to S. 5 could not name a single business or corporation which had reduced or eliminated other employee benefits when a voluntary or State-required family leave program was put in place.

Families and Work Institute copresident Ellen Galinsky testified on the results of a study made of State leave statutes in Minnesota, Oregon, Rhode Island, and Wisconsin. Dr. Galinsky reported that sizable majorities of covered employers reported that the State laws were neither costly nor burdensome to implement. For example, 88 to 95 percent reported that the State laws were not difficult to implement; 88 to 94 percent reported that the leave laws had not forced them to provide fewer health benefits; and 66 to 73 percent reported that the laws had not resulted in an increase in health benefit costs. Similarly, 56 to 84 percent reported no change in unemployment insurance costs; 74 to 77 percent reported no change in training costs; and 56 to 66 percent reported no change in administrative costs.

THE EXTENT OF EXISTING FAMILY LEAVE POLICIES

There have been several studies examining the extent of parental leave policies, particularly leave associated with pregnancy and parenting. One of the most recent studies on parental leave was conducted by the Bureau of Labor Statistics (BLS). Issued in June 1990 with data from 1989, the BLS survey found that 37 percent of

full-time employees working in private business with more than 100 workers are covered by unpaid "maternity leave"; 18 percent are covered by unpaid "paternity leave." These data represent only a slight change from 1989 BLS figures that found 33 percent of workers covered by "maternity leave" and 16 percent by "paternity leave."

A recent survey commissioned by the U.S. Small Business Administration (SBA) also studied the availability of family and medical leave policies. It found that while the majority of employers currently offer some type of sickness or disability leave, often vacation leave was the only type of leave available. The SBA study found that only "1 percent of the sample offered nondiscretionary unpaid sick leaves of specified length, where the firm also provides job and seniority guarantees and health benefit continuation." Moreover the study found 30 to 40 percent of employers do not offer job-guaranteed sick leave and that 70 to 90 percent of firms offer leave only of variable or unspecified length. The report observed "[s]uch leaves offer little security to employees if employers do not guarantee some minimum length of leave." The study further found that fewer than 10 percent of employers offer leave for infant care purposes.

A March 1990 survey of 253 U.S. corporations by Buck Consultants found that 27 percent of the firms currently have parental leave programs. Twenty-one percent of those firms that do not currently offer parental leave said that they intended to implement such a program within 10 years; 62 percent of employers who do not offer parental leave said they would offer such a program only if required to do so by State or Federal governments.

Additional surveys on the extent of family leave policies were conducted by The National Council of Jewish Women, Center for the Child, conducted in 1987, and Catylst, a national nonprofit research organization, in 1986. The findings of these surveys were consistent with later studies.

These studies, taken together, indicate that while many employers are providing family and medical leaves to their employees, a significant percentage of employers of all sizes have yet to adopt such policies. Behind these statistics are the women and men who pay a steep personal price for the lack of job-guaranteed leave. Economists Eileen Trzcinski and William Alpert, authors of the SBA study, estimate that 150,000 workers lose their jobs each year due to the lack of medical leave alone.

THE FMLA WILL HELP LOW-WAGE WORKERS

S. 5's guarantee of job security during family or medical crises is especially crucial to low-wage workers. Indeed, studies show that the least privileged, most vulnerable workers are least likely to be covered by job-protected leave policies.

A study by the Institute for Women's Policy Research found that working women who do not currently benefit from employer-provided leave had average annual earnings $5,000 *lower* than women with job-guaranteed leave. The lack of job-guaranteed leave leads to even further losses in earnings: working women without leave

lost $9,279 or 86 percent of their pre-birth earnings after childbirth; women with leave lost 51 percent of their pre-birth earnings.

Research by the Census Bureau echoes these findings, concluding that the less education a woman has, the less likely that she will have leave when she gives birth: only 36 percent of working women with less than a high school education had leave, compared to 79 percent of women with at least 4 years of college. Additional analysis by Cornell University economist Eileen Trzcinski found that unmarried mothers and part-time workers are especially likely to be without job-protected leave of any kind.

A study by the Families and Work Institute, "Beyond the Parental Leave Debate: The Impact of Laws in Four States," also concluded that family and medical leave policies aid low-income workers who are parents. The study found that after the implementation of family and medical leave laws, there was a decrease in the number of women who took pregnancy disability leaves of shorter duration than the medically recommended 6-week period. This finding is particularly significant for low-income women who, on average, take shorter leaves and are more likely to take fewer than 6 weeks to recuperate from childbirth than more affluent women.

Low-income workers are those most vulnerable to job loss. Because of less access to alternative arrangements, employees whose family members need care for a serious health condition have no choice—they must be absent from work for a period of time. Without job-secured family and medical leave and its promise of a steady paycheck, upon return from leave, low-wage workers in the midst of family or medical emergency risk debt, welfare, and even homelessness. While the need for family leave applies to workers across the economic spectrum, that need is greatest for the low wage earner.

EQUAL PROTECTION AND NON-DISCRIMINATION

The FMLA addresses the basic leave needs of all employees. It covers not only women of childbearing age, but all employees, young and old, male and female, who suffer from a serious health condition, or who have a family member with such a condition.

A law providing special protection to women or any defined group, in addition to being inequitable, runs the risk of causing discriminatory treatment. S. 5, by addressing the needs of all workers, avoids such a risk.

Thus S. 5 is based not only on the Commerce Clause, but also on the guarantees of equal protection and due process embodied in the 14th Amendment.

THE BILL IS COST EFFECTIVE

The best evidence that family and medical leave policies work comes from companies that have adopted such policies. The testimony of chief executive officers as well as workplace studies indicate that family and medical leave encourages loyal and skilled employees to remain with the company—improving employee morale, reducing turnover, and saving on costs for recruitment, hiring, and training.

In the 1990 study by Professors Eileen Trzcinski and William Alpert commissioned by the U.S. Small Business Administration (SBA), a nationwide survey of business executives examined the impact on businesses of providing family and medical leave. The SBA study found that the costs of permanently replacing an employee are significantly greater than those of granting a worker's request for leave. It found that terminations because of illness, disability, pregnancy, and childbirth cost employers from $1,131 to $3,152 per termination. The cost of granting worker's requests for leave was substantially lower—only between $.97 to $97.78 per week, depending on the size of the employer and on the managerial status of the employee. The study suggests that family and medical leave legislation would cost employers only $6.70 per covered employee per year.

The SBA study found that companies have routinely developed strategies to handle the work of employees while they are on leave. These strategies include re-routing work to others in the department, sending work home to the employee on leave, hiring temporary replacements, and leaving nonessential work until the employee's return from leave. The study concluded that even though many employers already have some sort of leave policy, legislation is necessary to ensure that workers receive basic guarantees of job security and continued health insurance coverage.

A 1992 study conducted by the Families and Work Institute also concluded that providing parental leave is more cost-effective for employers than permanently replacing employees who need leave. The study surveyed 331 supervisors about parental leave and its impact on productivity at a large high-technology company with a generous leave policy. It found that the cost of accommodating an employee's unpaid leave average 20 percent of the employee's annual salary, as compared to 75 percent to 150 percent for the cost of permanently replacing an employee.

The study also made the following findings about the impact of parental leave on employees' job performance: 94 percent of the leave-takers returned to the company; 75 percent of supervisors concluded that parental leave had a positive overall effect on the company's business; and rerouting and reassigning an employee's work are the most common and least expensive strategies for managing an employee's leave—employers and supervisors relied on these options 71 percent of the time.

The General Accounting Office (GAO) also found that the expense to employers of providing leave is minimal. In January 1989, the GAO issued a cost estimate of S. 345, the predecessor to S. 5 which was updated in April 1989. The GAO found that fewer than one-third of the workers taking extended family or medical leave are replaced and for those who are replaced, the associated cost was generally less than the wages and benefits that were paid to the absent workers before they took leave. Absences were typically handled by reallocating work among the remaining work force. While some inconvenience resulted, the GAO found that firms also experienced significant savings in wages not paid to the absent workers. The GAO estimated the annual cost of providing leave under the bill to be $188 million. In April 1989, the GAO estimated that including spousal care would increase costs by $142 million

annually to $330 million. The costs of S. 5 are likely to be even lower than those of S. 345 which offered longer periods of leave than S. 5.

The GAO also acknowledged that its estimates likely overstated the cost of leave legislation because the figures were not reduced to reflect existing family leave policies. Nor did the GAO take into account the key employee exemption for the top 10% of salaried employees. Further, although the GAO acknowledged the benefit of such legislation to employers in retaining a loyal and experienced workforce, this was not factored into the cost estimate.

The experience of individual employers further supports these findings. The Aetna Life and Casualty Co. reports that its family leave policy saves the company millions. Since 1988, Aetna has provided its employees with up to 6 months of unpaid job-guaranteed family leave each year with continued benefits and seniority. It estimates that since the cost of permanently replacing a worker generally amounts to 93 percent of the replacement's first year salary, its generous family leave program saved approximately $2 million in 1991 by reducing employee turnover. After instituting its family leave policy in 1988, Aetna found that only 12 percent of women who needed family leave ended up leaving the company—compared with 23 percent the year before, when family leave was not an option.

Uniform standards like the FMLA help all businesses maintain a minimum floor of protection for their employees without jeopardizing or decreasing their competitiveness. Moreover, the Family and Medical Leave Act is cost effective on a broader level as well because when families fail it is often the public sector that picks up the tab. Weakened families have been linked to many of the major social concerns we face today. The Government has in place extensive and often costly social welfare programs to deal with these social concerns. Public policy should address the causes of these problems rather than solely their effects. The FMLA responds to problems on which we have spent heavily by proposing a labor standard that will cost relatively little.

A study called "Unnecessary Losses" was conducted by the Institute for Women's Policy Research (IWPR). It estimated the economic costs to employees and taxpayers of the failure to provide family and medical leave. Released in 1989 and updated in 1990, it found that workers without leave suffer added unemployment and earnings losses after childbirth or illness because they cannot return to their former jobs. When they do return to work it is often at lower hourly wage rates. The study estimated that working women without family leave who give birth or adopt children suffer a cumulative earning loss of $607 million annually. Losses due to the lack of job-protected leave for workers who experience serious illness amount to $12.2 billion annually.

In addition the IWPR report found that workers without leave increase the costs of public programs such as welfare, supplemental security income, and unemployment insurance. "Unnecessary Losses" estimates that these costs to taxpayers amount to $108 million annually for the lack of parental leave for women and $4.3 billion annually for the lack of medical leave.

The enactment of the FMLA is a sound investment.

FAMILY LEAVE LAWS IN OTHER COUNTRIES

The United States is one of the few remaining countries in the world that has not enacted a law setting a standard for family leave. With the exception of the United States, virtually every industrialized country, as well as many Third World countries, have national policies that require employers to provide some form of maternity or parental leave.

The United States' major competitors provide some form of paid leave. Japan provides 12 weeks of partially paid pregnancy disability leave. In Canada, women can take maternity leave for up to 41 weeks and receive 60 percent of salary for the first 15 weeks. One hundred and thirty five countries provide at a minimum maternity benefits, 127 with some wage replacement. These policies are well established, with France, Great Britain, and Italy having had laws requiring maternity benefits prior to World War I, which are now part of more general paid sick leave laws providing benefits for all workers unable to work for medical reasons. Among the major industrialized countries, the average minimum paid leave is 12 to 14 weeks which many also providing the right to unpaid, job-protected leaves for at least 1 year. Leave is provided either through a national paid sick leave system or as part of a national family policy designed to enhance and support families. In September 1992 the European Community Commission issued a directive requiring that all member countries provide a standard minimum of 14 weeks paid maternity leave.

Sweden guarantees leave of 18 months of family leave at approximately 90 percent of gross pay. Either parent can use the leave, but not at the same time. Swedes are encouraged to use part of the leave when a child is born and to save the rest to help the child make the transition into school at age 7. A parent of a child under the age of 8 is entitled to as many as 90 sick days a year to care for a child's illness. Contrary to the widely held belief that employees would abuse such a liberal leave policy, the average usage rate of this leave is 7 days a year.

There are also several countries that provide leave for elder care. In Norway, employees can take paid leave equal to their income covered by pensions for up to 1 month a year to care for close relatives who are terminally ill. In Austria, paid leave of up to 1 week a year is available to care for a sick relative. The United Kingdom, France, and Luxembourg all have leave standards providing time off for care of an aged parent. Many of the industrialized countries that do not have specific leave policies to cover elder care have elaborate and generous long-term health care systems.

Many countries also accommodate the need for elder care by requiring that all employees have a minimum amount of paid annual leave. Workers in these countries have the flexibility to use annual leave more extensively to care for family members that American workers. Typical U.S. practice is to grant 2 weeks (10 days) annual leave for a new employee. In contrast, all Western European countries (except the U.K.) stipulate a legal minimum annual vacation period, usually to 3 to 5 weeks, starting with the first year of employment. This minimum is often extended through collective bargaining agreement, to 4 to 6 weeks vacation (plus paid public holi-

days) which is the norm in Europe. For example in Austria, the statutory minimum for annual leave is 30 days; in Germany, 18 days; in the Netherlands, 20 days, and in Norway, 21 days. Although the United Kingdom does not require a minimum annual leave by statute, the general practice is to offer 4 weeks.

Enactment of S. 5 will begin to close the gap between the leave statutes and policies in these countries and the United States.

FAMILY LEAVE LAWS IN THE STATES

Since Federal family leave legislation was first introduced, numerous States have begun to consider similar family leave initiatives. Approximately 30 States, the District of Columbia and Puerto Rico have adopted some form of family or medical leave.

California provides up to 16 weeks of leave over 2 years for the birth or adoption of a child, or for the serious health condition of a child, spouse, or parent. It applies to employers with 50 or more workers. California law also requires employers of five or more employees to provide women with a reasonable pregnancy disability leave of up to 4 months. Vermont provides 12 weeks of family and medical leave per year. Employers of 10 or more workers must provide leave to care for a newborn or newly adopted child; employers of 15 or more must also provide leave to care for the serious health condition of a worker's child, spouse, or parent, or for the worker's own serious health condition. The District of Columbia's law provides 16 weeks every 2 years for family leave, and a separate 16 weeks every 2 years for medical leave. Rhode Island's law provides 13 weeks of unpaid family and medical leave for birth, adoption or the serious illness of a family member and the worker's serious health condition. The Rhode Island law covers workers employed by firms of 50 or more. The Wisconsin law requires employers of 50 or more workers and the State government to grant up to 6 weeks of unpaid leave for the birth or adoption of a child, 2 weeks to care for a child, spouse or parent with a serious health condition, and 2 weeks of personal medical leave within a 12 month period. Oregon has enacted a law which provides for 12 weeks of unpaid parental leave per child for childbirth or adoption for all workers employed by companies with 25 or more employees. Oregon has also enacted a family leave law that provides 12 weeks of leave every 2 years to care for a seriously ill parent or spouse or to care for a sick child for workers employed by companies of 50 or more. The law in Maine requires private employers and local governments having 25 or more employees and the State government to grant up to 8 weeks (over a 2 year period) of unpaid leave for birth, adoption, care of a family member with a serious illness or the employee's own serious illness. North Dakota's law covers State employees and provides 16 weeks of family leave per year for birth, adoption, illness of a spouse, child, or parent. Pennsylvania's law covers State employees and provides 6 months (24 weeks) of parental leave for the birth or adoption of a child. Puerto Rico guarantees 8 weeks paid pregnancy leave at half salary, which can be extended an additional 12 weeks in the event of complications. Puerto Rico's law applies to all employers, and all employees are eligible for cover-

age. Minnesota has a 6 week parental leave law for birth or adoption covering workers at firms with 21 or more employees.

These States join many others that have enacted laws or regulations protecting employees' right to some form of family or medical leave including Alaska, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Montana, New Hampshire, New Jersey, North Carolina, Oklahoma, Tennessee, Washington, and West Virginia.

III. History of Legislation

LEGISLATIVE ACTION IN THE 103D CONGRESS

On January 21, 1993 Senator Christopher J. Dodd introduced S. 5, the Family and Medical Leave Act of 1993, a bill to entitle employees to unpaid leave in cases involving the birth, or adoption of an employee's child or the serious health condition of an employee or of the child, spouse or parent of an employee. Employers with 50 or more employees are covered by the legislation. The bill was referred to the committee on Labor and Human Resources.

A hearing was conducted by the Subcommittee on Children, Family, Drugs and Alcoholism on January 22, 1993.

On January 26, 1993, the Committee on Labor and Human Resources ordered S. 5 favorably reported without amendment. The Committee approved the bill by a roll call vote of 13–4.

HEARING

A hearing on S. 5 was held by the Subcommittee on Children, Family, Drugs and Alcoholism of the Committee on Labor and Human Resources, on January 22, 1993. The following individuals provided testimony:

The Honorable Robert Reich, Secretary-designate of Labor, Washington, DC.;

The Honorable Christopher S. Bond, U.S. Senate, Washington, DC.;

Linda and Rudy Fernandez, parents, Lynn, MA;

Mrs. Eva Skubel, parent, Moodus, CT;

Dr. Howard Pearson, President, American Academy of Pediatrics, New Haven, CT;

Ms. Judith Lichtman, President, Women's Legal Defense Fund, Washington, DC.;

Ms. Diane Duvall, Manager of Benefits and Compensation, Lotus Development Corp., Cambridge, MA;

Mr. Michael Losey, president and CEO, Society for Human Resource Management, Alexandria, VA.

IV. Committee Views

DEFINITIONS

Section 101(4)(A) defines an "employer" as any public agency as defined in section 3(x) of the FLSA, and any person engaged in commerce or in an industry or activity affecting commerce who employs 50 or more employees "for each working day for each of 20 or more calendar workweeks in the current or preceding calendar

year." The quoted language parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted this language, "[e]mploys * * * employees for each working day" is intended to mean "employ" in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose. For example, a bank that is open for public business 5 days per week will be considered to have all of its employees who are regularly maintained on its payroll as "employed for each working day," even though only a few of its employees, such as security guards or maintenance personnel, may perform work on weekend days. Similarly, part-time employees and employees on leaves of absence would be counted as "employed for each working day so long as they are on the employer's payroll for each day of the workweek. On the other hand, an employee who begins employment, i.e., is added to the employer's payroll, after the beginning of a workweek, or who terminates employment prior to the end of the workweek, will not count as being employed on "each working day" of such week.

The terms "parent" and "son or daughter" are defined in section 101(7) and 101(12) of the bill. These definitions reflect the reality that many children in the United States today do not live in traditional "nuclear" families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodation of their child care responsibilities are not the biological parent of the children they care for, but their adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults. This legislation deals with such families by tying the availability of "parental" leave to the birth, adoption, or serious health condition of a "son or daughter" and then defining the term "son or daughter" to mean "a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis * * *." (Section 101(12). In choosing this definitional language, the committee intends that the terms "parent" and "son or daughter" be broadly construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child.

The term "son or daughter" is further defined in section 101(12) to include not only children under 18 years of age, but also a son or daughter who is 18 years old or older if he or she is "incapable of self-care because of a mental or physical disability." The bill thus recognizes that in special circumstances, where a child has a mental or physical disability, a child's need for parental care may not end when he or she reaches 18 years of age. In such circumstances, parents may continue to have an active role in caring for the son or daughter. An adult son or daughter who has a serious health condition and who is incapable of self-care because of a mental or physical disability presents the same compelling need for parental care as the child under 18 years of age with a serious health condition.

The term "employee" is defined in section 101(3) as having the same meaning given such term in section 3(e) of the FLSA. This definition is broadly inclusive, as section 3(e) of the FLSA defines

"employee" as "any individual employed by an employer", and the FLSA definition of "employ", also incorporated in section 101(3), is broadly defined to include "suffer or permit to work." Included under the definition of "employee" in section 101(3) are individuals employed by public agencies such as the U.S. Postal Service or the U.S. Postal Rate Commission, individuals employed by a State, including the District of Columbia, or individuals covered by the Railway Labor Act.

The term "eligible employee" is defined in section 101(2)(A) to mean an employee of a covered employer who has been employed by the employer for a total of at least 12 months. These 12 months of employment need not have been consecutive. To be eligible for leave, the employee must, in addition, have worked for the employer for at least 1,250 hours of service during the 12 months period immediately preceding the commencement of the leave. Thus the bill does not cover part time or seasonal employees working less than 1,250 hours a year.

The minimum hours of service requirement is meant to be construed broadly, consistent with the legal principles established for determining hours of work for payment of overtime compensation under section 7 of the FLSA and regulations under that act, 29 CFR Part 785 (see 29 CFR 778.103). The determining factor in meeting the minimum hours of service rule is numbers of hours an employee has worked for the employer within the meaning of the FLSA, and is not to be limited by methods of record keeping or compensation agreements that do not reflect all the hours an employee has worked or been in service to the employer.

The term "eligible employee" is further defined in section 101(2)(B) to exclude any employee employed at a worksite with less than 50 employees if the total number of employees employed by the employer within 75 miles of the worksite is less than 50. In aggregating the number of employees at the worksite and within the 75 mile radius, all employees of the employer, not just eligible employees, are to be counted.

The term "worksite" is intended to be construed in the same manner as the term "single site of employment" under the Worker Adjustment and Retraining Notification Act ("WARN"), 29 U.S.C. 2101(a)(3)(B), and regulations under that Act (20 CFR Part 639). Where employees have no fixed worksite, as is the case for many construction workers, transportation workers, and salespersons, such employees' "worksite" should be construed to mean the single site of employment to which they are assigned as their home base, from which their work is assigned, or to which they report.

THE LEAVE PROVISIONS

Section 102 of S. 5 provides that an eligible employee may take up to 12 weeks of leave per year for the birth of a child or the placement of a child for adoption or foster care. Leave may also be taken in order to care for a child, a dependent son or daughter over the age of 18, a spouse or a parent who has a serious health condition. Finally, leave is available to an employee who, because of a serious health condition, is unable to perform the functions of his or her position.

The right to take leave applies equally to make and female employees. A father, as well as a mother, can take family leave because of the birth or serious health condition of his child; a son as well as a daughter is eligible for leave to care for a parent. When both the father and mother, or more than one sibling, are involved in the care of a child or parent, they can take leave at the same time, on an overlapping basis, or sequentially, as along as leave is taken "because of" one of the circumstances specified in section 102(a). Section 102 makes it possible, among other things, for a father to take leave during his wife's childbirth and recovery, an especially crucial time, even if his wife is herself an employee who is also on leave. Alternatively, it permits families to choose which parent or sibling will attend to extraordinary family responsibilities in light of the family's preferences, needs, career concerns, and economic considerations.

Section 102(a)(2) requires that leave provided under section 102(a)(1)(A) or (B) to care for a newborn child or a child newly placed with the employee for adoption or foster care be taken before the end of the first 12 months following the date of the birth or placement. Circumstances may, however, require that leave begin prior to the actual date of the birth or placement. An expectant mother, for example, may take medical leave under section 102(a)(1)(D) prior to the birth of her child if her condition is such that she is unable to work right up to the birth. Similarly, in the case of a placement for adoption or foster care, under section 102(a)(1)(B), leave may be taken upon the placement of a child or may begin prior to placement if an absence from work is required for such a placement to proceed.

Section 102(a)(1)(C) allows an eligible employee to take leave to care for a parent, spouse, son or daughter who has a serious health condition. Under this provision, an employee could take leave to care for a parent or spouse of any age who, because of a serious mental or physical condition, is in a hospital or other health care facility. An employee could also take leave to care for a parent or spouse of any age who is unable to care for his or her own basic hygienic or nutritional needs or safety. Examples include a parent or spouse whose daily living activities are impaired by such conditions as Alzheimer's disease, stroke, or clinical depression or who is recovering from major surgery or who is in the final stages of a terminal illness.

The phrase "to care for", in section 102(a)(1)(C), is intended to be read broadly to include both physical and psychological care. Parents provide far greater psychological comfort and reassurance to a seriously ill child than others not so closely tied to the child. In some cases there is no one other than the child's parents to care for the child. The same is often true for adults caring for a seriously ill parent or spouse. This language is also intended to assure employees the right to a period of leave to attend to a child's, spouse's, or parent's basic needs, both during periods of inpatient care and during periods of home care, when such child, spouse, or parent has a serious health condition.

Section 102(a)(1)(D) provides that leave may be taken by an eligible employee who, because of a serious health condition, is "unable to perform the functions of the position of such employee." The re-

quirement that the employee be unable to perform his or her job functions does not mean in each instance that the employee must literally be so physically or mentally incapacited that he or she is generally unable to work. An employee with early-stage cancer may, for example, be physically and mentally capable of performing her job, and indeed may continue to work while receiving treatment. However, if the employee must be physically absent from work from time to time in order to receive the treatment, it follows as a matter of common sense that the employee is, during the time of the treatments, temporarily "unable to perform the functions of his or her position" for purposes of section 102(a)(1)(D) and therefore eligible for leave for the time necessary to receive the treatments.

Similarly, an employee who is recovering from a serious health condition may be physically and mentally capable of resuming his normal job functions, but may nevertheless require continuing medical supervision or treatment to that condition for which he must periodically be absent from work, rendering him temporarily "unable to perform the functions" of his position. Examples would include an employee who has returned to work following major heart surgery but is required to report periodically to a physician for examination or monitoring.

It is intended that employees in such circumstances be entitled to leave under section 102(a)(1)(D).

NOTIFICATION AND SCHEDULING

The bill includes extensive notice requirements. Section 102(e) states that an employee must provide the employer with at least 30 days' notice of the need for leave for birth, adoption, or planned medical treatment when the need for such leave is foreseeable.

Such 30-day advance notice is not required in cases of medical emergency or other unforeseen events—for example, a premature birth, or sudden changes in a patient's condition that require a change is scheduled medical treatment. Similarly, parents who are waiting to adopt a child are often given very little notice of the availability of a child. In these situations, it is often impossible for an employee to give 30 days' advance notice.

Section 102(e) is intended to require 30 days advance notice of the need for leave to the extent possible and practical. Employees who face emergency medical conditions or unforeseen changes will not be precluded from taking leave if they are unable to give 30 days' advance notice.

Section 102(e) of the bill accommodates employer needs in "any case in which necessity for leave under this section is foreseeable based on planned medical treatment or supervision", by requiring the employee to make a reasonable effort to schedule the treatment or supervision so as not to disrupt unduly the employer's operations (subject to the approval of the employee's doctor or other health care provider).

CERTIFICATION

Section 103 concerns certification of a serious health condition. The provision is designed as a check against employee abuse of

leave under 102(a)(1) (C) and (D). If an employee requests leave because of a serious health condition or to care for a family member with a serious health condition, an employer may require that the request be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee as appropriate. The certification must state the date on which the serious health condition began, its probable duration, and the appropriate medical facts within the knowledge of the health care provider regarding the condition.

If the certification is for leave to care for a family member, the certification must also state that the employee is needed to care for the son, daughter, spouse or parent and must include an estimate of the amount of time that such employee needs to care for the family member. Consistent with the intent of section 102(a)(1)(C) that the provision of leave "to care for" an employee's family member who has a serious health condition be read broadly to allow leave for an employee to provide either physical or psychological care, the requirement in this subsection of a statement that the employee "is needed to care for" the family member is intended to encompass a need for psychological or for physical care.

If a certification is for leave because of the employee's own serious health condition, the certification must state that the employee is unable to perform the functions of the employee's position.

If the certification is for intermittent leave for planned medical treatment—for periodic chemotherapy treatments or physical therapy sessions, for example—the certification must also state the dates on which such treatment is expected to be given and duration of such treatment.

Section 103(c) provides that if the employer has reason to question the original certification, the employer may, at its own expense, require a second opinion from a different health care provider chosen by the employer. The health care provider may not be employed by the employer on a regular basis. Section 103(d) provides for the resolution on conflicts between first and second medical opinions. Under this section an employer may, at its own expense, require a third opinion from a provider jointly designated or approved by the employer and the employee. The third opinion will be considered final and binding. Under section 103(e) an employer may also require that the eligible employee obtain subsequent recertifications, but only on a reasonable basis.

The original certification shall, when possible, be provided in advance or at the commencement of the leave. If the need for leave does not allow for this, such certification should be provided reasonably soon after the commencement of the leave.

REDUCED AND INTERMITTENT LEAVE

Leave taken under sections 102(a)(1) (A) and (B) may not be taken intermittently or on a reduced leave schedule, unless the employee and the employer agree to such an arrangement. Leave taken under sections 102(a)(1) (C) and (D) may be taken intermittently or on a reduced leave schedule when medically necessary.

Such intermittent leave or reduced leave schedule does not result in a reduction in the total amount of leave to which the employee

is entitled under subsection (a) beyond the amount of leave actually taken. Thus an employee who takes 4 hours leave for a medical treatment has utilized only 4 hours of the 12 weeks of leave to which the employee is entitled.

Under section 102(b)(2) an employer may temporarily transfer an employee taking intermittent leave or leave on a reduced leave schedule for planned medical treatment to an equivalent alternative position that better accommodates such intermittent or reduced leave. This provision gives employers greater staffing flexibility by enabling them temporarily to transfer employees who need intermittent leave or leave on a reduced leave schedule to positions that are more suitable for recurring periods of leave. At the same time, this provision ensures that employees will not be penalized for their need for leave by requiring that they receive equivalent pay and benefits during the temporary transfer.

We anticipate that a reduced leave schedule will often be perceived as desirable by employers who would prefer to retain a trained and experienced employee part-time for the weeks that the employee is on leave rather than hire a full-time temporary replacement.

The provision of unpaid leave in accordance with this Act is not intended to affect in any way the exempt status of an employee who is otherwise exempt under regulations issued by the Secretary of Labor pursuant to section 13(a)(1) of the FLSA, the exemption applicable to bona fide executives, administrative, and professional employees. Where an employer provides family or medical leave in accordance with this act, the providing of such leave, whether paid or unpaid, as well as the maintenance of any records required by the Secretary with respect to such leave, would not be a factor in determining whether the employee is paid on a salary basis. (Section 102(c)).

SUBSTITUTION OF PAID LEAVE

Section 102(d) provides for the substitution of certain paid leaves for the unpaid leave mandated by this legislation. When an employer has required or an employee has elected to substitute for unpaid leave appropriate paid leave of less than 12 weeks duration, the employer need only provide an additional period of unpaid leave so that the total of paid and unpaid leave provided equals 12 weeks.

Section 102(d)(2)(A) allows an eligible employee to elect, or an employer to require the employee, to substitute any unused paid vacation leave, personal leave, or family leave accrued by the employee for any part of the leave provided under section 102(A)(1)(A), (B) or (C). The term "family leave" is used here to refer to paid leave provided by the employer covering the particular circumstances for which the employee is seeking leave under either section 102(a)(1) (A), (B) or (C).

Section 102(d)(2)(B) allows substitution of paid vacation leave, personal leave or medical or sick leave for any part of the leave required under section 102(a)(1)(C) or section 102(a)(1)(D). As stated in section 102(d)(2)(B), nothing in the act requires an employer to

provide paid sick leave or medical leave in any situation in which the employer does not normally provide such leave.

The purpose of section 102(d) is to provide that specified paid leaves which have accrued but have not yet been taken, may be substituted for the unpaid leave under the act in order to mitigate the financial impact of wage loss due to family and temporary medical leaves. The employer may not trade shorter periods of paid leave for the longer periods of unpaid leave prescribed by the act. Section 102(d) assures that an employee is entitled to the benefits of applicable paid leave, plus any remaining leave time made available by the act on an unpaid basis.

SPOUSES EMPLOYED BY THE SAME EMPLOYER

Section 102(f) provides a limitation on the right to take family leave when both spouses are employed by the same employer. Under section 102(f), if both spouses are employed by the same employer, the total amount of leave that they may take is limited to 12 weeks if they are taking leave under section 102(a)(1)(A) or (B) or leave to care for a sick parent under section 102(a)(1)(C). This provision is intended to eliminate any employer incentive to refuse to hire married couples.

MEANING OF SERIOUS HEALTH CONDITION

The definition of "serious health condition" in section 101(10) is broad and intended to cover various types of physical and mental conditions. The policies and interpretations discussed in connection with a "serious health condition" apply to both section 102(a)(1)(C) and section 102(a)(1)(D).

With respect to an employee, the term "serious health condition" is intended to cover conditions or illnesses that affect an employee's health to the extent that he or she must be absent from work on a recurring basis or for more than a few days for treatment or recovery. With respect to a child, spouse or parent, the term "serious health condition" is intended to cover conditions or illnesses that affect the health of the child, spouse or parent such that he or she is similarly unable to participate in school or in his or her regular daily activities.

The term "serious health condition" is not intended to cover short-term conditions for which treatment and recovery are very brief. It is expected that such conditions will fall within even the most modest sick leave policies. Conditions or medical procedures that would not normally be covered by the legislation include minor illnesses which last only a few days and surgical procedures which typically do not involve hospitalization and require only a brief recovery period. Complications arising out of such procedures that develop into "serious health conditions" will be covered by the act. It is intended that in any case where there is doubt whether coverage is provided by this act, the general tests set forth in this paragraph shall be determinative. Of course, nothing in the act is intended or may be construed to modify or affect any law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age, or disability, as section 401 clarifies.

Examples of serious health conditions include but are not limited to heart attacks, heart conditions requiring heart bypass of valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth. All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery. They also involve either inpatient care or continuing treatment or supervision by a health care provider, and frequently involve both. For example, someone who suffers a heart attack generally requires both inpatient care at a hospital and ongoing medical supervision after being released from the hospital; the patient must also be absent from work. Someone who has suffered a serious industrial accident may require initial lengthy treatment in a hospital and periodic physical therapy under medical supervision thereafter. A cancer patient may need to have periodic chemotherapy or radiation treatments, and a patient with severe arthritis may require periodic treatment such as physical therapy.

A pregnant patient is generally under continuing medical supervision before childbirth, may require several days off for severe morning sickness or other complications, receives inpatient care for childbirth, and is under medical supervision requiring additional time off during the recovery period from childbirth. The legislative history of the Pregnancy Discrimination Act established that the medical recovery period for a normal childbirth is 4 to 8 weeks, with a longer period where surgery is necessary or other complications develop.

All of these health conditions require absences from work either for the condition or operation itself or for continuing medical treatment or supervision (e.g., physical therapy for accident victims or severe arthritis patients). Because continuing treatment or supervision may sometimes take the form of intermittent visits to the doctor, section 102(b)(1) specifically permits an employee to take the leave covered by section 102(a)(1)(C) and section 102(a)(1)(D) "intermittently or on a reduced leave schedule when medically necessary." Only the time actually taken is charged against the employee's entitlement.

EMPLOYMENT AND BENEFITS PROTECTION

An employee taking leave under this bill is entitled, upon return from such leave, to be restored to his or her previous position or to "an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment." Section 104(a)(1). This provision is central to the entitlement provided in this bill.

The committee recognizes that it will not always be possible for an employer to store an employee to the precise position held before taking leave. On the other hand, employees would be greatly

deterred from taking leave without the assurance that upon return from leave, they will be reinstated to a genuinely equivalent position. Accordingly, the bill contains an appropriately stringent standard for assigning employees returning from leave to jobs other than the precise positions which they previously held. First, the standard of "equivalence"—not merely "comparability" or "similarity"—necessarily requires a correspondence to the duties and other terms, conditions and privileges of an employee's previous position. Second, the standard encompasses all "terms and conditions" of employment, not just those specified. This standard for evaluating job equivalence under section 104(a)(1)(B) parallels title VII's standard for evaluating job discrimination in 42 U.S.C. 2000e–2(a)(1), which prohibits "discriminat[ion] with respect to [an employee's] compensation, terms, conditions, or privileges of employment." For purposes of job equivalence, the committee intends that the statutory language contained in section 104(a)(1)(B) of this act shall be interpreted as broadly as similar language in section 703(a)(1) of title VII.

Section 104(a)(2) makes explicit that an employer may not deprive an employee who takes leave of benefits accrued before the date on which the leave commenced. Section 104(a)(3)(A) states that nothing in section 104(a) should be construed to entitle a restored employee to the accrual of any seniority or employment benefits during any period of leave. Section 104(a)(3)(B) states that nothing in section 104(a) should be construed to entitle a restored employee to any right, benefit, or position of employment other than any right, benefit or position to which the employee would have been entitled had the employee not taken leave. This means, for example, that if, but for being on leave, an employee would have been laid off, the employee's right to reinstatement is whatever it would have been had the employee not been on leave when the layoff occurred.

Section 104(a)(5) allows an employer to require an employee on leave under section 102 "to report periodically to the employer on the status and intention of the employee to return to work". This is intended to allow employers only to require such reports at reasonable intervals.

Section 104(b) contains a limited exemption from the restoration requirement of section 104 for certain highly compensated employees. To be considered highly compensated, an employee must be a salaried employee and be among the highest paid 10 percent of an employer's employees within 75 miles of the facility at which the employee works. For such employees, restoration may be denied if (A) the employer shows that such denial is necessary to prevent substantial and grievous economic injury to the employer's operations, (B) the employer notifies the employee that it intends to deny restoration on such basis at the time the employer determines that such injury would occur, and (C) in any case in which the leave has commenced, the employee elects not to return to employment within a reasonable period of time after receiving such notice. In measuring grievous economic harm, a factor to be considered is the cost of losing a key employee if the employee chooses to take the leave, notwithstanding the determination that restoration will be denied. A key employee who takes leave is still eligible for

continuation of health benefits, even if the employee has been notified that reinstatement will be denied. Under such circumstances, no recovery of premium may be made by the employer if such employee has chosen to take or continue leave after receiving such notice.

CERTIFICATION FOR RETURN TO WORK

Section 104(a)(4) provides that, as a condition of restoration for employees who have taken leave under section 102(a)(1)(D), it is permissible for an employer to have a formal company policy which requires all such employees to obtain medical certification from the employee's health care provider that the employee is able to resume work, except that nothing in section 104(a)(4) "shall supersede a valid State or local law or a collective bargaining agreement that governs the return to work of employees." This language clarifies that section 104(a)(4) was not meant to supersede other valid State or local laws or collective bargaining agreement that, for reasons such as public health, might affect the medical certification required for the return to work of an employee who had been on medical leave. For example, section 104(a)(4) does not supersede a State law that requires specific medical certification before the return to work of employees who have had a particular illness and who have direct contact with the public. The term "valid State or local law" makes it explicit that such State or local laws must not be inconsistent with any federal law such as the Pregnancy Discrimination Act, the Rehabilitation Act, the Americans with Disabilities Act,and other provisions of the Family and Medical Leave Act. Section 104(a)(4) is in no way to be construed as allowing States to undermine the rights established under these or any other Federal laws. Nor does this provision affect section 401(b), which permits States to enact laws that provide "greater employee family or medical leave rights than the rights established under this Act or any amendment made by this Act."

MAINTENANCE OF HEALTH BENEFITS DURING LEAVE AND COBRA

Section 104(c) requires an employer to maintain health insurance benefits during periods of leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave. The employer must maintain such coverage under any group health plan, as defined in section 5000(b)(1) of the Internal Revenue Code of 1986. Nothing in this section requires an employer to provide health benefits if it does not do so at the time the employee commences leave. Section 104(c) is strictly a maintenance of benefits provision. It should be noted, however, that if an employer establishes a health benefits plan during an employee's leave, section 104(c) should be read to mean that the entitlement to health benefits would commence at the same point during the leave that the employees would have become entitled to such benefits if still on the job.

An employer can recapture health insurance premiums paid during leave to an employee who fails to return to work after leave. This provision does not apply to a key employee who has

been denied restoration under section 104(b). Nor does this provision apply to employees who cannot return to work because they cannot perform the functions of the job because of their own serious health condition, or because of the need to care for the serious health condition of a family member, or because of other circumstances beyond their control (Section 104(c)(2)(B)).

This exception to the general recapture provision recognizes that some employees will be unable to return to work after 12 weeks because they are themselves disabled by a serious health condition or because they are needed to care for the serious health condition of a family member—such as a child battling leukemia.

In some instances, the employee's circumstances may suddenly and unexpectedly change during leave. For example, an employee taking leave for the birth of her child may discover in the tenth week of leave that her baby has serious birth defects requiring immediate surgery, thus making it impossible for her to return to work at the end of 12 weeks. Recognizing that workers should not be penalized for their failure to return to work due to circumstances beyond their control, section 104(c)(2)(B) exempts such workers from liability for repayment of health insurance premiums paid by their employers during the leave period.

If an employee's failure to return to work is due to the continuation, recurrence, or onset of a serious health condition—either the employee's own or that of a son or daughter, spouse, or parent—under section 104(c)(3) the employer may require certification by a health care provider. For an employee who is unable to return to work because of his or her own serious health conditions, such a certification is sufficient if it states that a serious health condition prevents the employee from being able to perform the functions of his or her position on the date that his or her leave expires. For an employee unable to return to work because of the serious health condition of a son or daughter, spouse, or parent, the certification is sufficient if it states that the employee is needed to care for such son, daughter, spouse, or parent on the date that the employee's leave expires. The language requiring that the certification state that the employee "is needed to care for" his or her family member is, like the same language in section 103(b)(4)(A), to be interpreted to include psychological or physical or medical care.

Leave taken under this act does not constitute a qualifying event (as defined in section 603(2) of the Employee Retirement Income Security Act of 1974) under the continuation of health benefit provisions contained in title X of the Consolidated Omnibus Budget Reconciliation Act of 1985 (Public Law 99-272) (COBRA). However, a qualifying event triggering COBRA coverage may occur when it becomes known that an employee is not returning to employment and therefore ceases to be entitled to leave under this act. The purpose of this Act is to provide leave to eligible employees for the circumstances described in section 102, and is not to be construed by employees as a means of delaying a qualifying event.

MAINTENANCE OF HEALTH BENEFITS UNDER MULTIEMPLOYER PLANS

Section 104(c) of the bill requires an employer to maintain coverage for the employee under any group health plan for the limited

duration of the employee's leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave. In the case of an employer that contributes to a multiemployer health plan (i.e., a health plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements), this requirement means that the employer of the employee taking leave must continue contributing to the plan on behalf of the employee for the duration of the leave, as if the employee had continued in employment throughout the period of leave, unless the plan expressly provides for some other method of maintaining coverage for a period of leave required by the bill. The employee's benefit rights shall continue to be governed by the terms of the plan.

An employer may be obligated to contribute to a multiemployer health plan on behalf of its employees pursuant to a collective bargaining or other agreement, the terms of a plan, or a duty imposed by labor-management relations law. In any event, the committee's intent is that where the method of providing group health plan coverage is through contributions to a multiemployer plan, the employer, unless the plan expressly provides otherwise, shall be obligated to continue contributing as if the employee were not on leave, notwithstanding any terms of any collective bargaining or other agreement to the contrary, and the employee shall look to the plan for his or her benefit rights.

The committee recognizes that multiemployer plans need to receive contributions to finance benefit coverage. To ensure that a plan receives employer contributions, the obligation to contribute imposed by the bill, like other statutory obligations imposed by current law, shall be considered an obligation enforceable under 29 U.S.C. 1145 (relating to delinquent contributions to a multiemployer plan). This is not intended to preclude any other means of enforcement that the plan may provide or be entitled to purpose, but to vest a plan with an absolute right to invoke section 1145.

During the period of leave, the employer shall make contributions to the plan at the same rate and in the same amount as if the employee were continuously employed. Unless the contrary is clearly demonstrated by the employer (or by the plan, where appropriate), it shall be assumed that the employee would have continued working on the same schedule, at the same wage or salary, and otherwise under the same terms and conditions as he or she normally worked before going on leave. So, for example, if the employee normally worked 160 hours a month before taking leave and the employer is obligated to contribute to a multiemployer health plan at the rate of $1.25 an hour, the employer would be obligated to continue contributing to the plan on behalf of the employee during the leave period at the rate of $1.25 an hour for 160 hours a month, unless the employer clearly shows that the employee would have worked fewer hours, or the plan clearly shows that the employee would have worked more hours, had he or she not been on leave.

A plan may adopt more specific rules governing an employer's contribution obligation during the leave period. For example, a plan may adopt a rule that an employee's normal number of work hours a month is the average number of work hours a month over

the month (or a period of months) immediately prior to the employee's leave period. A plan could adopt rules which accommodate its particular reporting period (e.g., monthly, weekly). Also, the committee intends that an employer shall provide the plan with whatever information is appropriate to assist the plan in determining an employee's status and whether the employer has an obligation to contribute on behalf of the employee.

The bill does not give an employee on leave any greater rights or benefits under a multiemployer plan than an employee who is not on such leave. The same conditions of coverage shall apply to an employee on such leave as apply to an employee who is not on such leave from the employer. This includes any obligations and conditions with respect to employee contributions.

And, of course, these obligations apply only with respect to an "eligible employee" within the meaning of section 101(2) of the bill; that is, an employee who has met the length of employment test. Neither the employer nor the multiemployer plan has any obligation under the bill with respect to persons who are not "eligible employees."

PROHIBITED ACTS

Section 105(a)(1) makes it unlawful for any employer to interfere with or restrain or deny the exercise of any right provided under the act. Section 105(a)(2) makes it also unlawful for an employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by this title. This "opposition" clause is derived from title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e–3(a)) and is intended to be construed in the same manner. Under section 105(a) of this Act, as under title VII of the Civil Rights Act, an employee is protected against employer retaliation for opposing any practice that he or she reasonably believes to be a violation.

Title VII's opposition clause "forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment." *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 796 (1973). The Equal Employment Opportunity Commission (EEOC) has identified a number of examples of "opposition" protected by section 704(a) of the Civil Rights Act: complaining to anyone (including management, unions, other employees, or newspapers) about allegedly unlawful practices; participating in a group that opposes discrimination; refusing to obey an order because the worker thinks it is unlawful under the act; opposing unlawful acts by persons other than the employer—e.g., former employers, unions, and coworkers. EEOC Compliance Manual sec. 492. Section 105(a)(2) of the Family and Medical Leave Act is intended to provide the same sorts of protection to workers who oppose, protest, or attempt to correct alleged violations of the FMLA.

Section 105(b) further states that it is unlawful for an employer to discharge or in any other manner discriminate against an employee because such employee has filed a charge, has instituted a proceeding under or related to title I, has given or is about to give information in connection with any inquiry or proceeding relating

to a right provided under title I or has testified or is about to testify in any inquiry or proceeding relating to a right provided under title I. This provision is modeled on section 15(a)(3) of the Fair Labor Standards Act of 1938 (FLSA) and is similarly intended to achieve the objective of protecting employees who file charges or otherwise participate in proceedings under this title and of promoting the integrity of such inquiries or proceedings.

INVESTIGATIVE AUTHORITY

To insure compliance with the Family and Medical Leave Act, the Secretary of Labor is given investigative authority in section 106(a) parallel to the authority provided to the Secretary with regard to enforcement of the FLSA. Under Section 106(b), employers are required to make, keep and preserve records pertaining to compliance with the FMLA, but the Secretary may not under authority of section 106 require employers to submit their books or records to the Secretary more than once during any twelve month period unless the Secretary has reason to believe that the act has been violated or in investigating a complaint of violation.

CIVIL ENFORCEMENT

S. 5's enforcement scheme is modeled on the enforcement scheme of the FLSA, which has been in effect since 1938. Thus the FMLA creates no new agency or enforcement procedures, but instead relies on the time-tested FLSA procedures already established by the Department of Labor.

Rights established under the FMLA are enforceable through civil actions. Under section 107 a civil action for damages or equitable relief may be brought against an employer in any Federal or State court of competent jurisdiction by the Secretary of Labor or by an employee, except that an employee's right to bring such an action terminates if the Secretary of Labor files an action seeking monetary relief with respect to that employee. Actions for relief must be brought not later than 2 years after the date of the last event constituting the alleged violation, or within 3 years of the last event if the violation is willful.

RELIEF

The relief provided in FMLA also parallels the provisions of the FLSA. Section 107 provides for injunctive and monetary relief for violations of the act.

Section 107(a)(1)(A)(i) provides that an employer who violates section 105 of the act shall be liable to the eligible employee either for an amount equal to the wages, salary, employment benefits, or other compensation denied or lost to such employee because of the violation, or in cases in which no wages or other compensation were denied to the employee, for an amount equal to the actual monetary losses sustained by the employees as the result of the violation, such as the cost of providing care, up to a sum equal to 12 weeks of wages or salary for the employee. Section 107(a)(1)(A)(ii) provides that an employer also shall be liable for the interest on that amount described in clause (i), calculated at the prevailing rate.

Section 107(a)(1)(A)(iii) provides that an employer shall be liable for an additional amount a liquidated damage, equal to the sum of the amount described in clauses (i) and (ii). The section provides, however, that the court has the discretion to award no liquidated damages, if the employer proves to the satisfaction of the court that the act or omission was made in good faith and the employer had reasonable grounds for believing that it was not a violation.

Relief available under section 107(a)(1)(B) in the event of a violation also includes equitable relief such as employment, reinstatement or promotion of the affected employee, and any other equitable relief that may be appropriate. This section is intended to provide employees with the right to pursue all varieties of equitable relief, including preliminary relief.

Section 107(a)(3) provides that in addition to any judgment awarded to the plaintiff, the court shall allow reasonable attorney's fees, reasonable expert witness fees, and other costs of the action to be paid by the defendant. With the exception of the allowance of expert witness fees, this provision is modeled after section 216(b) of the Fair Labor Standards Act, and therefore should be interpreted in the same way as the FLSA. According to the Federal courts, the award of attorney's fees under the FLSA is mandatory and unconditional. A court has no discretion to deny fees to a prevailing plaintiff; its discretion extends only to the amount allowed. *Shelton* v. *Ervin,* 830 F.2d 182, 184 (11th Cir. 1987); *United Slate, Tile and Composition Roofers* v. *G & M Roofing,* 732 F.2d 495, 501 (6th Cir. 1984); *Graham* v. *Henegar,* 640 F.2d 732, 736 (5th Cir. 1981) (en banc). See also *Hagelthorn* v. *Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir. 1983).

The provision requiring defendants to pay reasonable expert fees has been included in the bill in direct response to the Supreme Court's holding in *West Virginia University Hospitals, Inc.* v. *Casey,* 111 S.Ct. 1138 (1991). In that case, the Court made clear that expert witness fees will be awarded only if explicitly authorized by statute.

SPECIAL RULES CONCERNING EMPLOYEES OF LOCAL EDUCATIONAL AGENCIES

This section is based on the unique educational mission of our public elementary and secondary schools. It is premised on the belief that schools are a special institution that require special attention. It recognizes the need to balance the educational needs of children with the family leave needs of teachers.

Section 108(d)(1) provides that in certain circumstances teachers returning from leave under the act within the last 3 weeks of a school term could be required to extend their leave until the end of the semester. This affords teachers the needed leave without interrupting the educational process at a key point in the year. When a teacher needs to be repeatedly away from work because of recurrent medical treatments for a serious medical condition, the school may require that the teacher choose between taking off a block of time or being temporarily transferred to a position that better accommodates the repeated leave.

Section 108(b) states that a local education agency does not violate the Individuals With Disabilities Education Act, Section 504 of the Rehabilitation Act, or title VI of the Civil rights Act solely as a result of granting leave under the FMLA. This section is intended to clarify the relationship of the FMLA to certain other Federal statutes. It makes clear that simply granting leave under the Act does not in and of itself violate the statutes listed in this section. However, the granting of leave does not relieve a local educational agency from its obligations under such acts.

The phrase "an employee employed principally in an instructional capacity" in section 108(c) and section 108(d) is intended to include teachers or other instructional employees whose principal function is directly providing educational services. This would include special education assistants, such as signers, whose presence in the classroom is necessary to the educational process. It would not include teacher assistants, cafeteria workers, building service workers, bus drivers, and other primarily noninstructional employees.

Whenever a teacher is required to extend his or her leave under section 108 (c) or (d), such leave would be treated as other leave under the act, with the same rights to employment and benefits protection contained in section 104. Reasonable grounds under subsection (f) of section 108 could include such factors as advice of counsel, collective bargaining agreements, and compliance with valid State and local laws, the laws referenced in 108(b), and regulations or policies promulgated by the Department of Labor.

COMMISSION ON FAMILY AND MEDICAL LEAVE

Title III of this act establishes a bipartisan commission, to be known as the Commission on Leave, to conduct a comprehensive study of existing and proposed leave policies, the potential costs, benefits, and impact on productivity of such policies on employers. The study should also include examination of possibilities for State rather than Federal enforcement of family and medical leave rights of employees of local educational agencies. The Commission is to report its findings to Congress within 2 years of its first meeting.

The Commission is to be composed of 12 voting members and 2 ex-officio members. The Speaker and Minority Leader of the House of Representatives and the Majority and Minority leaders of the Senate each are to appoint to the Commission one Member of Congress and 2 additional Commission members selected by virtue of their expertise in family, medical and labor-management issues, including representatives of employers. The Secretary of Health and Human Services and the Secretary of Labor shall serve as nonvoting ex-officio members.

MISCELLANEOUS

Title IV of the act contains miscellaneous provisions concerning the effect of this legislation on other legislation and on existing employment benefits, encouraging more generous leave polices, regulations, and effective dates. Section 401(a) provides that nothing in the act shall be construed to modify or affect in any way any Fed-

eral or State law prohibiting discrimination on the basis of race, religion, color, national origin, sex, age or disability. Thus, for example, nothing in this legislation may be read to affect or amend title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e et seq., as amended by Public Law 95–555, 92 Stat. 2076 (1978).

The Family and Medical Leave Act is also not intended to modify or to affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990, or the regulations issued under that act. Thus, the leave provisions of the Family and Medical Leave Act are wholly distinct from the reasonable accommodation obligations of employers covered under the Americans with Disabilities Act, employers who receive Federal financial assistance, employers who contract with the Federal government, or the Federal government itself. The purpose of the FMLA is to make leave available to eligible employees and employers within its coverage, and not to limit already existing rights and protection.

Section 401(b) makes it clear that state and local laws providing greater leave rights than those provided in S. 5 are not preempted by the bill or any other federal law. This applies to state and local laws in effect at the time of enactment or state and local laws enacted in the future. Thus, for example, state or local laws that provide greater employee coverage, longer leave periods, or paid leave, are not preempted by this act to the extent that they provide leave in a manner more inclusive or more generous than that provided in S. 5.

For example, current Oregon law provides 12 weeks of parental leave for eligible employees who work for employers of 25 or more. Eligible employees employed by firms of 50 or more would, of course, be entitled to twelve weeks of family leave under this act; however, nothing in this act supersedes Oregon's provision of parental leave to employees of firms with 25 or more (but fewer than 50) employees. Similarly, Puerto Rico's law providing for half pay to employees temporarily disabled because of pregnancy, childbirth or related medical conditions is not superseded by this act; the act requires only that employers of 50 or more make up any difference between the paid disability period and the 12-week period provided under this act so that employees are entitled to twelve weeks of paid and unpaid leave. Likewise, Wisconsin State law provisions under which employees may substitute paid or unpaid leave of any other type provided by the employer for portions of family leave or medical leave would not be superseded by the FMLA.

Section 401(b) also clarifies that state family leave laws at least as generous as that provided in S. 5 (including leave laws that provide continuation of health insurance or other benefits, and paid leave), are not preempted by ERISA, or any other federal law.

Section 402(a) specifies that employees must continue to comply with collective bargaining agreements or employment benefit plans providing greater benefits than the act. Conversely, section 402(b) makes clear that rights under the act cannot be taken away to collective bargaining or employer plans.

Finally, section 405 sets forth the act's effective dates. Title III, creating the Commission, goes into effect on the date of the enact-

ment of the act. Where there is a collective bargaining agreement in effect on the date of enactment, Title I becomes effective either on the date the agreement terminates, or one year after the date of enactment, whichever occurs earlier. Otherwise, the act goes into effect six months after the date of enactment. The committee intends that an employee's employment with a covered employer prior to the effective date of the act is to be counted determining whether an employee is eligible for leave under the requirements of section 101(2)(A)(i) and 101(2)(A)(ii). Thus, an employee who has worked for a covered employer for 12 months or more prior to the effective date of the act and, during the preceding 12 months has been employed for at least 1,250 hours of service, would be eligible for leave commencing immediately on the effective date of the act.

V. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, January 27, 1993.

Hon. Edward M. Kennedy,
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 5, the Family and Medical Leave Act of 1993, as ordered reported by the Committee on Labor and Human Resources on January 26, 1993. The estimated costs of Titles, I, II, III, and V of S. 5 are discussed below. Title IV contains miscellaneous provisions and effective dates that have no budgetary impact.

TITLE I

Title I of S. 5 would allow a private sector employee up to twelve weeks of leave without pay during any 12-month period, because of the birth of a son or daughter. The placement of a child for adoption or foster care with the employee also would entitle the employee to this leave. In addition, an employee could claim this leave to care for a seriously ill son, daughter, spouse or parent. Also, title I would permit the employee up to 12 weeks of temporary medical leave in any 12-month period due to a serious health condition preventing the employee from performing the functions of his or her position. Title I would not apply to any employer if the total number of employees employed by that employer within 75 miles of that work site is less than 50.

Title I would allow civil suits by employees aggrieved under the provision of this Act, and also would allow the Secretary of Labor to sue for damages on behalf of employees whose employers have violated the Act. Any sums recovered by the Secretary of Labor on behalf of such employees will be held in escrow in a special deposit fund, to be paid directly to each eligible employee at the Secretary of Labor's direction. If the Secretary of Labor is unable to pay the eligible employee within three years of receiving the money, the sum owed the employee will be transferred to the Treasury of the United States as a miscellaneous receipt. Collection and deposit of such receipts could result in increased receipts to the federal gov-

ernment. While we expect the amount of any such receipts to be small, we have no basis for predicting the amount.

Any direct costs of providing this leave would be borne entirely by the private employer and would not affect the federal budget. Nevertheless, enactment of this bill would entail additional administrative costs for the Department of Labor (DOL). Costs would vary with the number of claims filed under S. 5. CBO assumes this bill would be administered directly by the DOL Wage and Hour Division.

The Wage and Hour Division works to obtain compliance with the minimum wage, overtime, child labor, and other employment standards, and we assume it could administer this act as well. This division handles compliance actions for approximately one million people per year, as well as fulfilling its other administrative duties. The budget for this division currently is about $95 million annually. No data are available as to the estimated number of claims that would be filed under the Family and Medical Leave Act of 1993.

Costs would vary not only with the caseload, but also with the manner in which the DOL assures compliance with these provisions.

TITLE II AND TITLE V

Title II and Title V of S. 5 would allow most federal government employees and most employees of the Congress up to 13 weeks of leave without pay during any 12-month period, in addition to any other type of leave, for the birth, adoption, or foster care placement of a child or to care for a sick child or parent. Title II and Title V also would entitle an employee to 12 weeks of leave without pay during any 12-month period when the employee is unable to work because of a serious health condition. In addition, Title II and Title V would guarantee job protection and allow for continuation of work-related benefits for employees who take such leave.

Under current law, there is no comprehensive federal policy on parental and medical leave. The Office of Personnel Management provides guidelines for granting leave for various purposes, but implementation of leave policy is up to the discretion of each employee's supervisor.

Based on information from a number of federal agencies, it appears that employees who currently take leave without pay for purposes encompassed by S. 5 generally take it for periods of time shorter than authorized by the bill. Thus, enactment of this bill would result in more leave without pay for affected federal employees, although there is no basis for predicting how much additional leave would be taken. Whether this would increase agencies' costs depends on whether the agencies hire temporary replacements and what salary and benefits are paid. A General Accounting Office study of private firms' practices indicates that in many cases no temporary replacements are hired. While no comparable information is available regarding federal agencies, we believe that, in aggregate, granting employees leave without pay for extended periods does not result in costs greater than if the employees continued to work—in part because the salaries and benefits of temporary replacements will sometimes be less than those of the permanent em-

ployees and in part because sometimes replacements will not be hired. To the extent that agencies have to hire replacement personnel, some additional costs could result from increased recruiting and personnel administration, but we do not expect such costs to be significant.

TITLE III

Title III of this bill would establish the Commission on Family and Medical Leave to study existing and proposed policies on such leave, and the potential costs, benefits, and impact on productivity of such policies on employers. Travel expenses, per diem allowances, and salary and overhead costs for an executive director and staff also are authorized, although no specific authorization level is stated in the bill. We estimate these costs could be about $300,000 per year for the two-year life of the Commission. Costs of Title III most likely would begin late in fiscal year 1993 or in 1994, depending on the date of enactment. Titles I, II and V of the bill would take effect six months after the date of enactment, while Title III would become effective upon enactment.

PAY-AS-YOU-GO

Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 sets up pay-as-you-go procedures for legislation affecting direct spending and receipts. There could be increased receipts to the federal government resulting from enactment of this bill; however, CBO is unable to estimate the amount.

ESTIMATED COST TO STATE AND LOCAL GOVERNMENTS

There are no data available for estimating the cost impact of S. 5 on state and local governments. They would be responsible for any costs associated with providing the leave specified in Title I to their employees, including employees of public elementary and secondary schools. These costs could vary with the frequency and duration of leave taken, and with the type and number of replacement personnel needed. Moreover, by the end of 1992 eleven states and the District of Columbia had enacted their own family and medical leave laws that cover employees in both the public and private sector. Furthermore, 32 states have some type of family or medical leave policies for some employees. Therefore, in these states, S. 5 may have less of an effect on state and local government costs than in those states with no similar legislation.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Mickey Buhl (226–2860) and Cory Oltman (226–2820).

Sincerely,

ROBERT D. REISCHAUER, *Director.*

VI. REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the following statement of the regulatory impact of S. 5 is made:

A. ESTIMATED NUMBER OF INDIVIDUALS AND BUSINESSES REGULATED AND THEIR GROUPS OR CLASSIFICATIONS

S. 5 would regulate every private and public sector employer with 50 or more employees within a 75-mile radius. This number is estimated as approximately 293,000 establishments. Employees who have worked at least one year and 1250 hours for that employer would be eligible for leave under the Act. This number is estimated as approximately 44 million employees. Those not regulated would be all employers with fewer than 50 employees.

B. ECONOMIC IMPACT ON THE INDIVIDUALS, CONSUMERS AND BUSINESSES AFFECTED

Individuals will have their jobs protected and their health insurance coverage maintained during the unpaid family and medical leave. The risk of unemployment will be reduced for individuals who, without S. 5, would have lost their jobs. Similarly, those who could have found new jobs only at lower pay rates will maintain their previous rates of pay upon return from leave. According to a study by the Institute for Women's Policy Research, employed women who gave birth and do not have family leave lose an estimated $607 million in earnings annually, much of which will be saved as a result of this bill. Cost savings will also accrue to individuals on leave as a result of their health insurance being maintained.

There is no evidence of economic impact on consumers as a result of S. 5. Costs to consumers cannot be expected to increase or decrease since the additional costs to employers are minimal and since there is no evidence of greater business losses where state laws require similar family and medical leave.

The 1989 General Accounting Office study of similar legislation concluded that there would be no measurable net costs to business from replacing workers or lost productivity. The GAO study concluded that the cost of family and medical leave legislation to employers would be less than $236 million annually. This cost results exclusively from the continuation of health insurance coverage for employees on unpaid leave.

C. IMPACT OF THE ACT ON PERSONAL PRIVACY

The Committee believes that this legislation has no significant impact on personal privacy. The rights of an employer under section 103 to require certification of serious illness is in keeping with practices commonly associated with disability insurance or sick leave programs. Employer abuse of privacy is precluded by the section 105 prohibition against interference with an employee's exercise of his or her rights. In addition, employer use of private information must be consistent with the Privacy Act of 1974 requirement that information collected for one purpose not be disclosed for a different purpose without the individual's consent.

D. ADDITIONAL PAPERWORK, TIME AND COSTS

The bill would result in some additional paperwork, time and costs to the Department of Labor, which would be entrusted with

implementation and enforcement of the Act. It is difficult to estimate the volume of additional paperwork necessitated by the Act, but the Committee does not believe it will be significant.

VII. Section-by-Section Analysis

Section 1. Short title; table of contents

This section designates this Act as the Family and Medical Leave Act of 1993 and sets out the table of contents.

Section 2. Findings and purposes

Congress finds that the number of single-parent households and two-parent households in which the single parent or both parents work is increasing significantly; parents should be able to participate in early childrearing and the care of their children with serious health conditions; the lack of employment policies to accommodate working parents forces many individuals to choose between job security and parenting; and there is inadequate job security for employees whose serious health conditions temporarily prevent them from working.

The purposes of this Act are to balanace the demands of the workplace and the needs of families; to entitle employees to take reasonable leave, for family or medical reasons; and to accommodate the legitimate interests of employers.

TITLE I—GENERAL REQUIREMENTS FOR LEAVE

Section 101. Definitions

This section defines certain terms for purposes of the Act. Those definitions specifically referenced to the Fair Labor Standards Act are to be interpreted similarly under this Act.

Eligible employee—means any employee as defined in section 3(e) of the FLSA who is employed by the employer with respect to whom benefits are sought for not less than 12 months and not less than 1250 hours over the previous 12 month period, except that such term does not include Federal officers or employees covered under Title II of the Act.

Employer—means any person engaged in commerce who employs 50 or more employees within a 75-mile radius during 20 or more calendar weeks in the current or preceding calendar year; any successor in interest of an employer; and any public agency defined under section 3(x) of the FLSA.

Serious health condition—means an illness, injury, impairment, or physical or mental condition which involves inpatient care in a hospital, hospice, or residential health care facility; or continuing treatment or supervision by a health care provider.

Section 102. Leave requirement

An employee is entitled to 12 weeks of leave during any 12-month period; because of the birth, placement for adoption or foster care of a child; in order to care for an employee's son, daughter, spouse, or parent who has a serious health condition; or because of an employee's own health condition.

When taking leave because of the birth or placement of a child the following conditions apply: the leave expires at the end of the 12 month period after such birth or placement; such leave may not be taken intermittently or on a reduced leave schedule unless the employee and the employer agree otherwise. Leave to care for a seriously ill family member or one's own serious illness may be taken intermittently or on a reduced leave schedule when medically necessary, subject to the certification requirements.

Leave may be unpaid. The employee or employer may elect to substitute for leave due to the birth or placement of a child or leave to care for a seriously ill family member, any accrued paid vacation leave, paid personal leave, or paid family leave. The employee or the employer may elect to substitute for leave due to an employee's own serious illness any accrued paid vacation leave, paid personal leave, paid sick leave or paid medical leave. Such paid leave may offset any part of the required paid leave and may be reduced from the 12-week period.

When the need for leave is foreseeable, the employee shall provide reasonable prior notice. When the need for leave is foreseeable based on planned medical treatment or supervision, the employee shall make a reasonable effort to schedule leave so as not to disrupt unduly the employer's operations, subject to the approval of the health care provider of the employee or of the employee's child, spouse, or parent.

When a husband and wife employed by the same employer are entitled leave because of the birth or placement of a child or to care for a sick parent, the aggregate period of family leave may be limited to 12 weeks.

Section 103. Certification

An employer may require medical certification stating: (1) the date on which the serious health condition commenced, (2) the probable duration, and (3) medical facts regarding the condition. For purposes of medical leave, such certification shall also state that the employee is unable to perform the functions of his or her position. For purposes of family leave to care for a seriously ill child, spouse or parent, such certification shall include an estimate of the amount of time that the employee is needed to care for the child, spouse or parent. The employer may require, at its own expense, a second medical opinion and periodic recertifications. Should the first and second opinions differ, the employer may require at its own expense the opinion of a third jointly approved health care provider, whose opinion shall be binding. The employer may require recertifications during the leave.

Section 104. Employment and benefits protection

This section entitles any employee upon the return from leave to be restored to the same or an equivalent position.

The taking of leave shall not result in the loss of any benefits earned before the leave. Nothing in this section shall entitle any employee to any right or benefit to which the employee would not have been entitled upon beginning the leave. The employer may require periodic reporting on intention to return to work.

The employee's pre-existing health benefits shall be maintained during any leave.

Section 105. Prohibited acts

It is unlawful for any employer to interfere with, restrain, or deny the exercise of any right provided under this title. It is also unlawful for any employer to discharge or otherwise discriminate against any individual for opposing a practice made unlawful under the Act, or for participating in any inquiry or proceeding relating to rights established under the Act.

Section 106. Investigative Authority

To ensure compliance with Title I, this section gives the Secretary of Labor investigative authority parallel to the authority provided to the Secretary with regard to enforcement of the Fair Labor Standards Act of 1938 (FLSA).

Employers are required to make, keep and preserve records pertaining to compliance with the Family and Medical Leave Act. The Secretary may not, however, under authority of this section require any employer, plan, fund or program to submit records more than once during any 12-month period unless the Secretary has reason to believe that the Act has been violated or is investigating a complaint of violation.

Section 107. Enforcement

Employers who violate section 105 are liable to affected employees for monetary damages resulting from the violation, plus interest, and an amount equal to the actual damages and interest as liquidated damages, except that the court has discretion not to award liquidated damages if the employer proves to the satisfaction of court that it acted in good faith and reasonable grounds to believe that its acts or omissions were not a violation. Relief available in the event of a violation also includes such equitable relief as may be appropriate, including employment, reinstatement, and promotion. Prevailing plaintiffs are entitled to a reasonable attorney's fee, reasonable expert witness fees, and costs to be paid by the defendant.

A civil action for damages or equitable relief may be brought against an employer in any federal or state court of competent jurisdiction by the Secretary of Labor or by any employee, except that an employee's right to bring such an action is terminated if the Secretary files an action seeking relief with respect to that employee. Actions must be brought not later than two years after the date of the last event constituting the alleged violation, or within three years of the last event if the violation is willful.

Section 108. Special rules concerning employees of local educational agencies

A public or private elementary or secondary school will not be considered in violation of any existing laws solely because leave was provided.

If a public or private elementary or secondary school teacher seeks to take intermittent medical leave which is foreseeable based on planned medical treatment and if such leave will result in the

teacher's absence from the classroom over 20% of the time, the teacher may be required to either (a) take continuous leave for the entire treatment period or (b) be placed in an equivalent position that would not be disruptive to the classroom.

A public elementary or secondary school teacher may be required to extend leave through the end of a semester if a teacher would otherwise have returned within the last 2–3 weeks of the semester's end, depending on the date on which the leave commenced and the duration of the leave.

For purposes of certain enforcement actions, determinations shall be made on the basis of established school board policies.

Section 109. Notice

Each employer shall post a notice setting forth the pertinent provisions of this title. Any employer who willfully violates this section is liable up to $100 for each offense.

TITLE II—LEAVE FOR CIVIL SERVICE EMPLOYEES

This title extends coverage of the Act to federal government civil service employees.

TITLE III—COMMISSION ON LEAVE

Section 301. Establishment

This section establishes the Commission on Leave.

Section 302. Duties

The Commission shall conduct a comprehensive study of existing and proposed policies on leave and the costs, benefits, and impact on productivity of such policies on employers. The Commission shall submit a report to the Congress within 2 years.

Section 303. Membership

The Commission shall be composed of 12 voting members and 2 ex-officio members appointed by the Senate and the House. Such members shall be appointed by virtue of demonstrated expertise in family, temporary disability and labor-management issues and shall include representatives of employers. The Secretary of Health and Human Services and the Secretary of Labor shall serve as non-voting ex-officio members.

Section 304. Compensation

The Members of the Commission shall be unpaid.

Section 305. Powers

The Commission shall meet within 30 days of appointment and shall hold such hearings as appropriate, and may obtain information and assistance from federal agencies.

Section 306. Termination

The Commission shall terminate 30 days after the date of the submission of its final report to the Congress.

TITLE IV—MISCELLANEOUS PROVISIONS

Section 401. Effect on other laws

Nothing in this Act shall be construed to affect any federal or state law prohibiting discrimination or any state law which provides greater leave rights.

Section 402. Effect on existing employment benefits

Nothing in this Act shall diminish an employer's obligation under a collective bargaining agreement or employment benefit plan to provide greater leave rights nor may the rights provided under this title be diminished by such agreement or plan.

Section 403. Encouragement of more generous leave policies

Nothing in this Act shall be construed to discourage employers from adopting policies more generous than required under this Act.

Section 404. Regulations

The Secretary of Labor shall prescribe regulations to carry out Titles I and IV of this Act not later than 120 days after enactment.

Section 405. Effective dates

This act shall generally take effect 6 months after the date of enactment. In the case of a collective bargaining agreement, the Act shall take effect upon the termination of the agreement, but no later than 12 months after enactment. The Commission on Leave shall take effect on the date of enactment.

TITLE V—COVERAGE OF CONGRESSIONAL EMPLOYEES

Section 501. Leave for certain Senate employees

The rights and protections established under sections 101 through 105 shall apply to employees of the Senate. Allegations of violations shall be handled consistent with Sections 304 through 313 of the Government Employee Rights Act of 1991.

Section 502. Leave for certain House employees

The rights and protections available under Title I of this Act shall apply to employees of the House of Representatives. The remedies and procedures under the Fair Employment Practices Resolution shall be applied.

VIII. Committee Action

On January 26, 1993, the Chairman of the Committee on Labor and Human Resources, Senator Kennedy, convened an Executive Session of the committee to consider S. 5.

The committee considered a motion to favorably report the bill. By roll call vote of 13 to 4, the committee agreed to the motion.

YEAS	NAYS
Kennedy	Kassebaum
Pell	Gregg
Metzenbaum	Thurmond
Dodd	Hatch
Simon	
Harkin	
Mikulski	
Bingaman	
Wellstone	
Wofford	
Jeffords	
Coats	
Durenberger	

IX. MINORITY VIEWS OF SENATORS HATCH, KASSEBAUM, GREGG, AND THURMOND

Each of us strongly supports the concept of providing time off from work for family and medical purposes. But means, not motives, must guide a rational determination of whether any particular legislative product is worthy of support. In this case, this proposal seeks to mandate a national leave policy that will reduce overall employee benefits. Employers will be forced to eliminate voluntary benefits in order to pay for the mandated ones. New family and medical leave requirements in S. 5 will burden employers, especially smaller and medium-sized businesses, with the costs of mandated leave regardless of their ability to absorb such costs.

Our view is that family leave is desirable and should be encouraged through a policy of providing incentives and lifting legal restrictions. This will enable more employers to provide family and medical leave and will preserve the elements of choice and flexibility inherent to the successful employer-employee relationship and necessary for us to remain competitive in a global economy.

I. Background

America is fast becoming a society in which nearly everyone works. Today, over two-thirds of the nation's adult women are in the work force, and over half of the mothers with children are employed full-time. According to Workforce 2000 and other labor studies, two-thirds of the new entrants into the work force between now and the end of this century will be women, most of them in their childbearing years, and two-thirds of all preschool children will have mothers working outside the home. Clearly, one of the tasks we face is to reconcile the conflicting needs of women, work, and families.

Working parents should not be forced to choose between careers and families. They need to be able to continue to hold their jobs and earn income to support their families, while at the same time raise their families, have babies, tend to their children's needs, and care for sick infants and ailing parents. Balancing is required so that family needs and the demands of the workplace are both accommodated.

Granting family and temporary medical leave is an admirable idea whose time has come. It should be encouraged in the workplace. To remain competitive in the job market, to recruit and retain good employees, and to improve productivity, particularly in a time of growing skilled-labor shortages, employers will want to offer more attractive benefits. Family and medical leave will help to alleviate the concerns of working men and women with young children and aging parents. Such benefits will also ease the transition from welfare to work for low-income and disadvantaged families. In our view, every effort should be made—short of federal mandates—to encourage more and more employers to include family and medical leave among the benefits they provide their employees.

II. Problems

The practical problems and costs associated with mandating family and medical leave are, however, considerable. Congress cannot properly and adequately determine and regulate the individual needs of workers and their families. Government should not force its judgment concerning such needs onto the employer-employee relationship. It is one thing for employers to decide to offer employees a package of benefits that includes family leave. It is quite another for the federal government to dictate what benefits an employer must provide and to whom and under what conditions.

If the Congress compels an employer to provide a particular benefit, the total package of benefits is not necessarily enlarged. Instead, it may necessitate the removal or reduction of some other benefits—benefits that employees may prefer. When employers are able to offer a wide array of benefits, the individual employee can select the kind of benefit most suitable to his or her needs. The growing trend toward more flexible benefit programs in the workplace will be constrained by mandating family and medical leave, much to the detriment of those employees who do not need or desire such leave.

As a practical matter, more women than men will take advantage of family leave. Thus, mandated leave would be especially costly for firms which employ a majority of women. This will almost certainly lead to a loss of employment opportunities for young women of childbearing age, as well as low-skilled or marginal workers and teenages, whose jobs will be sacrificed to pay for these added benefits.

We are concerned by the growing trend we perceive in the Congress toward mandating benefits. It is now a widely accepted proposition that we can no longer afford to create new federal spending programs because they add to the budget deficit and fuel inflation. However, the supporters of S. 5 seem to be arguing that Congress can simply mandate that business provide these benefits, at their own expense, without costing the U.S. Treasury any more than the cost of policing and regulating these programs. Proponents of this approach overlook the European experience with mandated benefits, which is that they have contributed significantly to economic stagnation as well as higher levels of unemployment. We should think long and hard before embarking on a policy which would reduce our competitiveness and result in the loss of American jobs.

III. Conclusion

In summary, we believe that encouraging the expansion of family and medical leave is a good idea. It is good business policy; it is good family policy. That is why we endorse the idea of providing incentives for encouraging the adoption of family leave programs and of retaining choice and flexibility in benefits policy. At the same time, we should reexamine and reform those statutes and regulations that restrict the ability of working parents to spend more time with their families. For instance, some wage-and-hour laws need to be amended to permit more flextime, comp-time, and work at home.

However, for each of the reasons contained in these views, we cannot support the approach contained in the current version of the "Family and Medical Leave Act of 1993." Such a mandate will reduce the choice and flexibility available to employers and employees that have been the hallmark of our labor force and have contributed to our competitive standing abroad. Mandating family and medical leave, as S. 5 would do, will be counterproductive, especially for women in the work force, and will be unnecessarily injurious to our economy as it attempts recovery.

ORRIN HATCH.
JUDD GREGG.
NANCY LANDON KASSEBAUM.
STROM THURMOND.

X. Changes in Existing Law

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section therof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 5—UNITED STATES CODE

* * * * * * *

CHAPTER 21—DEFINITIONS

* * * * * * *

Sec. 2101. Civil Service; Armed Forces; Uniformed Services.—For the purpose of this title—

(1) * * *

* * * * * * *

Sec. 2105. Employee.—

(a) * * *

* * * * * * *

(c) the Fair Labor Standards Act of 1938; [or]

* * * * * * *

(E) subchapter V of chapter 63, which shall be applied so as to construe references to benefit programs to refer to applicable programs for employees paid from nonappropriated funds; or

* * * * * * *

CHAPTER 63—LEAVE

Subchapter I—Annual and Sick Leave

Sec.
6312. * * *

* * * * * * *

Subchapter V—Family and Medical Leave

6381. Definitions.
6382. Leave requirement.
6383. Certification.
6384. Employment and benefits protection.
6385. Prohibition coercion.
6386. Health insurance.
6387. Regulations.

* * * * * * *

Subchapter IV—Voluntary Leave Bank Program

SEC. 6361. DEFINITIONS.—For the purpose of this subchapter the term—

(1) * * *

* * * * * * *

SUBCHAPTER V—FAMILY AND MEDICAL LEAVE

§ 6381. Definitions

For the purpose of this subchapter—

(1) the term "employee" means any individual who—

(A) is an "employee", as defined by section 6301(2), including any individual employed in a position referred to in clause (v) or (ix) of section 6301(2), but excluding any individual employed by the government of the District of Columbia and any individual employed on a temporary or intermittent basis; and

(B) has completed at least 12 months of service as an employee (within the meaning of subparagraph (A));

(2) the term "health care provider" means—

(A) a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; and

(B) any other person determined by the Director of the Office of Personnel Management to be capable of providing health care services;

(3) the term "parent" means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter;

(4) the term "reduced leave schedule" means a leave schedule that reduces the usual number of hours per workweek, or hours per workday, of an employee;

(5) the term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—

(A) inpatient care in a hospital, hospice, or residential medical care facility; or

(B) continuing treatment by a health care provider; and

(6) the term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is—

(A) under 18 years of age; or

(B) 18 years of age or older and incapable of self-care because of a mental or physical disability.

§ 6382. Leave requirement

(a)(1) Subject to section 6383, an employee shall be entitled to a total of 12 administrative workweeks of leave during any 12-month period for one or more of the following:

(A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.

(B) Because of the placement of a son or daughter with the employee for adoption or foster care.

(C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.

(D) Because of a serious health condition that makes the employee unable to perform the functions of the employee's position.

(2) The entitlement to leave under subparagraph (A) or (B) of paragraph (1) based on the birth or placement of a son or daughter shall expire at the end of the 12-month period beginning on the date of such birth or placement.

(b)(1) Leave under subparagraph (A) or (B) of subsection (a)(1) shall not be taken by an employee intermittently or on a reduced leave schedule unless the employee and the employing agency of the employee agree otherwise. Subject to paragraph (2), subsection (e)(2), and section 6383(b)(5), leave under subparagraph (C) or (D) of subsection (a)(1) may be taken intermittently or on a reduced leave schedule when medically necessary. In the case of an employee who takes leave intermittently or on a reduced leave schedule pursuant to this paragraph, any hours of leave so taken by such employee shall be subtracted from the total amount of leave remaining available to such employee under subsection (a), for purposes of the 12-month period involved, on an hour-for-hour basis.

(2) If an employee requests intermittent leave, or leave on a reduced leave schedule, under subparagraph (C) or (D) of subsection (a)(1), that is foreseeable based on planned medical treatment, the employing agency may require such employee to transfer temporarily to an available alternative position offered by the employing agency for which the employee is qualified and that—

(A) has equivalent pay and benefits; and

(B) better accommodates recurring periods of leave than the regular employment position of the employee.

(c) Except as provided in subsection (d), leave granted under subsection (a) shall be leave without pay.

(d) An employee may elect to substitute for leave under subparagraph (A), (B), (C), or (D) of subsection (a)(1) any of the employee's accrued or accumulated annual or sick leave under subchapter I for any part of the 12-week period of leave under such subsection, except that nothing in this subchapter shall require an employing agency to provide paid sick leave in any situation in which such employing agency would not normally provide any such paid leave.

(e)(1) In any case in which the necessity for leave under subparagraph (A) or (B) of subsection (a)(1) is foreseeable based on an expected birth or placement, the employee shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the birth or placement requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

(2) In any case in which the necessity for leave under subparagraph (C) or (D) of subsection (a)(1) is foreseeable based on planned medical treatment, the employee—

(A) shall make a reasonable effort to schedule the treatment so as not to disrupt unduly the operations of the employing agency, subject to the approval of the health care provider of

the employee or the health care provider of the son, daughter, spouse, or parent of the employee, as appropriate; and

(B) shall provide the employing agency with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

§ 6383. Certification

(a) An employing agency may require that a request for leave under subparagraph (C) or (D) of section 6382(a)(1) be supported by certification issued by the health care provider of the employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employing agency.

(b) A certification provided under subsection (a) shall be sufficient if it states—

(1) the date on which the serious health condition commenced;

(2) the probable duration of the condition;

(3) the appropriate medical facts within the knowledge of the health care provider regarding the condition;

(4)(A) for purposes of leave under section 6382(a)(1)(C), a statement that the employee is needed to care for the son, daughter, spouse, or parent, and an estimate of the amount of time that such employee is needed to care for such son, daughter, spouse, or parent; and

(B) for purposes of leave under section 6382(a)(1)(D), a statement that the employee is unable to perform the functions of the position of the employee; and

(5) in the case of certification for intermittent leave for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment.

(c)(1) In any case in which the employing agency has reason to doubt the validity of the certification provided under subsection (a) for leave under subparagraph (C) or (D) of section 6382(a)(1), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a second health care provider designated or approved by the employing agency concerning any information certified under subsection (b) for such leave.

(2) Any health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employing agency.

(d)(1) In any case in which the second opinion described in subsection (c) differs from the original certification provided under subsection (a), the employing agency may require, at the expense of the agency, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employing agency and the employee concerning the information certified under subsection (b).

(2) The opinion of the third health care provider concerning the information certified under subsection (b) shall be considered to be

final and shall be binding on the employing agency and the employee.

(e) The employing agency may require, at the expense of the agency, that the employee obtain subsequent recertifications on a reasonable basis.

§ 6384. Employment and benefits protection

(a) Any employee who takes leave under section 6382 for the intended purpose of the leave shall be entitled, upon return from such leave—

(1) to be restored by the employing agency to the position held by the employee when the leave commenced; or

(2) to be restored to an equivalent position with equivalent benefits, pay, status, and other terms and conditions of employment.

(b) The taking of leave under section 6382 shall not result in the loss of any employment benefit accrued prior to the date on which the leave commenced.

(c) Except as otherwise provided by or under law, nothing in this section shall be construed to entitle any restored employee to—

(1) the accrual of any employment benefits during any period of leave; or

(2) any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken the leave.

(d) As a condition to restoration under subsection (a) for an employee who takes leave under section 6382(a)(1)(D), the employing agency may have a uniformly applied practice or policy that requires each such employee to receive certification from the health care provider of the employee that the employee is able to resume work.

(e) Nothing in this section shall be construed to prohibit an employing agency from requiring an employee on leave under section 6382 to report periodically to the employing agency on the status and intention of the employee to return to work.

§ 6385. Prohibition of coercion

(a) An employee shall not directly or indirectly intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce, any other employee for the purpose of interfering with the exercise of any rights which such other employee may have under this subchapter.

(b) For the purpose of this section—

(1) the term "intimidate, threaten, or coerce" includes promising to confer or conferring any benefit (such as appointment, promotion, or compensation), or taking or threatening to take any reprisal (such as deprivation of appointment, promotion, or compensation); and

(2) the term "employee" means any "employee", as defined by section 2105.

§ 6386. Health insurance

An employee enrolled in a health benefits plan under chapter 89 who is placed in a leave status under section 6382 may elect to continue the health benefits enrollment of the employee while in such

leave status and arrange to pay currently into the Employees Health Benefits Fund (described in section 8909), the appropriate employee contributions.

§ 6387. Regulations

The Office of Personnel Management shall prescribe regulations necessary for the administration of this subchapter. The regulations prescribed under this subchapter shall, to the extent appropriate, be consistent with the regulations prescribed by the Secretary of Labor under title I of the Family and Medical Leave Act of 1993.

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